

**ELECTRONIC SURVEILLANCE WITHIN THE UNITED  
STATES FOR FOREIGN INTELLIGENCE PURPOSES**

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**HEARINGS**  
**BEFORE THE**  
**SUBCOMMITTEE ON INTELLIGENCE AND THE**  
**RIGHTS OF AMERICANS**  
**OF THE**  
**SELECT COMMITTEE ON INTELLIGENCE**  
**OF THE**  
**UNITED STATES SENATE**  
**NINETY-FOURTH CONGRESS**  
**SECOND SESSION**  
**ON**  
**S. 3197**  
**THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1976**  
**JUNE 29, JULY 1, AUGUST 6, 10, AND 24, 1976**



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S. 3197

# FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1976

TUESDAY, JUNE 29, 1976

U.S. SENATE,  
SUBCOMMITTEE ON INTELLIGENCE  
AND THE RIGHTS OF AMERICANS  
OF THE SELECT COMMITTEE ON INTELLIGENCE,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 224, Russell Senate Office Building, Hon. Birch Bayh (chairman of the subcommittee) presiding.

Present: Senators Bayh, Garn, Inoyue, Baker, Hathaway, Biden, and Case.

Also present: William G. Miller, Staff Director; Michael Madigan, Minority Counsel.

Senator BAYH. We will convene our hearing this morning. I would like to make some very brief opening remarks before our first witness comes in, because this is the first meeting of this subcommittee, and because of the significant role it is designed to play. It is important, as well as fair and equitable, to permit each of our colleagues to at least briefly address themselves to the legislation before us.

This morning marks the first meeting of the Subcommittee on Rights of Americans of the Select Committee on Intelligence. With this meeting we are beginning what I am sure will be a long, difficult and ultimately a very important task. In the months ahead, it will be this subcommittee's particular responsibility to see that the needs of our Government for intelligence information are met efficiently and effectively and in a manner that is consistent with the fundamental rights of American citizens.

In my opinion, the weight of our responsibility cannot be overstated. Allegations of widespread abuse of rights by the intelligence community led to the previous select committee's 15-month investigation of intelligence activities. The committee's finding that abuses had been even more serious and more frequent than most of us had imagined led to the bipartisan call for a permanent congressional committee on intelligence oversight. This subcommittee has now been charged by the Intelligence Committee's distinguished chairman, Senator Inoyue, with accomplishing a large part of what so many have advocated.

All of us are aware of the important role of the intelligence community in protecting the safety and welfare of our country and all of our citizens, but it is our duty as members of this Committee to keep a vigilant watch on the intelligence community and to insure that Americans are protected from the invasion of their rights while the intelligence community is fulfilling its responsibility.

Our success or failure in carrying out our duties will be an important factor in the resolution of the basic conflict between the needs of a free society and an open society which is based on individual liberties, and its government's needs to gather and protect very sensitive information in an increasingly small and dangerous world.

As chairman of the subcommittee, I am confident that we can make a major contribution toward putting the various interests in proper perspective, and easing the tensions between them. I firmly believe that America can protect itself from foreign domination without forsaking the very freedoms which make it worth protecting.

It is significant that our first meeting is an important business session. This morning we will begin 3 days of hearings on S. 3197, the Foreign Intelligence Surveillance Act of 1976. The bill was ordered reported by the Senate Judiciary Committee and referred to the Committee on Intelligence pursuant to Senate Resolution 400.

S. 3197 will establish requirements and procedures for obtaining court orders for electronic surveillance of individuals whom, under the terms of the bill, might be American citizens. It is an extremely important piece of legislation for two reasons: First, it will set the ground rules for the use of electronic surveillance in intelligence cases, a technique which has been widely used in the past. Second, in setting such rules for electronic surveillance, it will establish a precedent and undoubtedly have an impact on congressional treatment of other intrusive investigative techniques such as mail covers and surreptitious entries.

Today, tomorrow, and Thursday we will hear from a number of experts who have studied this and are familiar with the role of electronic surveillance in meeting the Government's needs for foreign intelligence information. We will address ourselves to a number of important issues which are confronted by this bill.

Our first witness this morning, Senator Kennedy, is in an extremely significant position to address himself to these questions, and I appreciate his willingness to be our first witness this morning. I would like to first ask our distinguished committee chairman, Senator Inouye, if he has any remarks that he might wish to make and our distinguished ranking minority member, Senator Garn, if he has any opening remarks.

Mr. GARN. Mr. Chairman, I have some brief remarks. I have always felt the purpose of a congressional hearing was to hear the witness and not hear the Senators, so I will be brief.

I am pleased to serve as vice chairman of this very important subcommittee. As Senator Bayh has already noted, the subcommittee will deal with legislation and other matters which vitally affect the rights of all Americans. This subcommittee will inquire into areas of the intelligence field which have been in the past subject to abuses. It will also try to fashion legislation which will protect our citizens by strengthening the methods by which the intelligence agencies gather information.

Today's hearing we consider an extremely important piece of legislation, the Foreign Intelligence Surveillance Act. This act would bring foreign intelligence electronic surveillance under the judicial warrant procedure for the first time. I note that the Judiciary Committee was initially referred this bill when it was sent to the Congress

by the President. That committee held hearings on the bill and is about to file a report with the Senate. Under the provisions of S. Res. 400, which created this Committee, this bill is the first piece of legislation which has been referred to us.

In that regard, this Committee intends to vigorously exercise its oversight function and carefully examine the bill and all of its provisions. While the bill was voted out of the Judiciary Committee by an 11 to 1 vote, and enjoys bipartisan support, it does contain several controversial provisions. This subcommittee intends to look carefully at those provisions, examining all of the evidence in support of and against the various provisions of this bill.

I am pleased that today we are able to begin the first of 3 days of hearings that this subcommittee will hold on the wiretap bill. Tomorrow's testimony will be taken in executive session in order to probe the value and worth of electronic surveillance in the foreign intelligence area. We also have the benefit of the testimony before the House and the Senate Judiciary Committees, as well as all of the documentary data which has been received by these other committees.

With that, Mr. Chairman, I look forward to hearing the testimony of Senator Kennedy.

Senator BAKER. Mr. Chairman, could I say a word before we proceed? I am going to have to leave the hearing to attend the confirmation hearings of the Commerce Committee nominee and I am late now.

I want to say three quick things if I could. One, I commend you and the ranking member of the subcommittee for having these hearings. Two, it is an important bill, but I think it is equally important that we move on it promptly. I hope in our first legislative endeavor that we move promptly and do not procrastinate.

The third thing I would like to say, Mr. Chairman, is that we are in our early phases of development of our Committee, and I notice around the room we have much personal staff here as well as transition staff. I also note tomorrow's hearing is in executive session. It would be my intention, Mr. Chairman, that only those fully cleared and only committee staff, not personal staff, be permitted to attend the executive session tomorrow.

Thank you, Mr. Chairman.

Senator BAYH. Senator Hathaway.

Senator HATHAWAY. Thank you very much, Senator Bayh. I will just take a minute. I just want to take an opportunity to commend the Committee Chairman, Senator Inouye, and the Vice Chairman, Senator Baker, for their leadership in establishing this Subcommittee on the Rights of Americans. If we have learned nothing else from the revelations of the past several months, we have certainly discovered how vigilant we must all be in order to insure that some of the intelligence abuses of the past do not recur.

I feel very privileged to have been asked to serve on the subcommittee and look forward to doing all that I can to support and maintain an intelligence system which is second to none, and which is sensitive to the fundamental liberties of the American people.

Senator Kennedy, I want to join my colleagues in welcoming you here today. Your leadership with respect to S. 3197 has brought us to an historical crossroad in an issue which has troubled the American

people for many years. At long last, the subject of wiretapping and bugging will be entirely the subject of judicial as well as Congressional scrutiny, and warrants will be required to seize any of the people's conversations, just as they have always been required for seizure of their property and possessions.

I notice from your statements at the Judiciary hearings that there were certain provisions of the bill, Senator Kennedy, which you were not fully satisfied with, such as the absence of a definition for clandestine intelligence activities in the inherent power clause. I hope during the course of your testimony that you will bring us up to date as to just what your feelings are on those provisions, and any other reservations you might have about the bill.

Thank you very much, Mr. Chairman.

Senator BAYH. Does the Senator from New Jersey have anything?

Senator CASE. Thank you.

I think that the introductory phase has been very well covered and I am not going to enlarge on it. I do want to say this for myself. I have found that I had plenty to do this year without the addition of this particular assignment, but I was pressed both by our ranking minority member and by the chairman of the subcommittee to come on this subcommittee. I am glad to do it and make the necessary effort because of the importance of these matters. The resolution of the dilemmas that exist in this area is one of our most important subjects this year, and I am sure that it is worth everybody's effort to give attention to.

Senator BAYH. The Senator from Delaware.

Senator BIDEN. Thank you, Mr. Chairman. I am anxious to hear what the Senator from Massachusetts has to say, so I won't delay the proceedings by saying anything myself.

Senator BAYH. We appreciate the distinguished Senator from Massachusetts being here. As one who has had the opportunity to work with him on the Judiciary Committee, and as one who is very sensitive to the rights of Americans and to the protection of these rights from invasion; and inasmuch as there is some criticism directed at this bill, I think he is in a unique position to defend them and explain them, and describe for this Committee the delicate negotiations in which he has participated. Thus, I think it is appropriate that he be our leadoff witness.

Senator Kennedy.

#### TESTIMONY OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman, and members of the committee.

I have a brief opening statement which I would like to review in its entirety, and then I would like to respond to the questions or expand on any of those particular aspects of it which are of interest to the Committee. I am very much aware, as I am sure all of us in the Senate are, of the schedule that we are faced with over on the floor, and roll-call votes, and a full witness agenda. So I will try and be brief, but also be complete in the areas of concern to this Committee.

I want to thank you, Mr. Chairman, for the opportunity to address this Committee on a matter of vital concern to all of us, the subject of

foreign intelligence electronic surveillance. The Senate has just recently recognized the need for a permanent standing committee to exercise oversight responsibilities with respect to our Nation's intelligence agencies. The abuses of recent history sanctioned in the name of national security and documented in detail by the Church committee, highlight the need for more effective congressional oversight. You have the major responsibility of seeing to it that history does not repeat itself, that civil liberties and rights of our citizens are not bargained away in the name of national security. I wholeheartedly endorse your efforts and offer you my support.

Mr. Chairman, today this Committee begins hearings on the Foreign Intelligence Surveillance Act of 1976, a bill I introduced in March with broad, bipartisan support. The bill, S. 3197, is endorsed and has the support of the administration in general. Attorney General Levi in particular has been most cooperative and helpful in the drafting of this legislation. The bill constitutes a major step forward in bringing needed safeguards to the unregulated area of foreign intelligence surveillance. The legislation is designed to strike a balance between the protection of national security and the protection of our human liberties and rights. It is a recognition, long overdue, that the rule of law must prevail in the area of foreign intelligence surveillance.

No one has to tell you, Mr. Chairman, of the dismal record of the Congress in failing to deal with the issue of electronic surveillance. For the last 5 years I, and others in the Senate have labored unsuccessfully to place some meaningful statutory restrictions on the so-called inherent power of the Executive to engage in such surveillance. There has been legislation introduced by the Senator from Maryland, Senator Mathias, and Senator Nelson of Wisconsin, probably two of the most active and interested members of the Senate in this area. We have, the three of us, tried to work very closely, both in legislation which we have introduced in the past, which has never gotten anywhere, and also in the fashioning of this legislation.

Five sets of Senate hearings have been conducted in as many years. Bills have been introduced only to die a slow death in committee; speeches have been made, only to fall on deaf ears; inquiries made of the executive branch have been ignored or have been answered in a half-hearted way. The sad fact is that despite over 5 years of effort by a small group of Senators, Congress has failed to enact a statute controlling foreign intelligence electronic surveillance.

This bill achieves a major breakthrough in the debate. It would, for the first time, substitute carefully prescribed accountability and oversight for the arbitrariness of the past. It would require that all surveillance be subject to a judicial warrant requirement. For an American citizen to be surveilled, there must be probable cause that he is an agent of a foreign power, a citizen acting pursuant to the direction of a foreign power, and engaging in sabotage, terrorism, or clandestine intelligence activities. The bill would require that, before such surveillance could occur, a named executive branch official certify in writing and under oath that such surveillance is necessary to obtain foreign intelligence information.

This is the kind of accountability which has heretofore not existed; and I think that this is an important aspect. It would for the first time expressly limit whatever inherent power the President may have to engage in surveillance in the United States, and that also is an

extremely important aspect of it. It is the first time that there has been willingness by the Executive, as stated by the Attorney General as spokesman, to indicate that the limitations on any power which may exist.

It would provide civil and criminal sanctions to those who violate its provisions: Up to 5 years in jail for violation, and heavy penalties as well, in terms of any kind of an abuse of this particular power that should be by any executive authority, and it would require that all extraneous information obtained as a result of the surveillance be minimized.

As important as any individual provision in the bill is the fact that at long last, legislation placing foreign electronic surveillance under legal controls has a reasonable chance of becoming law. On June 15th, the Senate Judiciary Committee overwhelmingly approved this legislation and sent it to the Senate floor. As you know, Mr. Chairman, it was the first time in over 8 years that any comprehensive electronics legislation has been favorably reported out of the Senate Judiciary Committee.

I am not unaware of the concerns expressed by some about various provisions of the bill. I and others in the Senate have shared these very concerns over the years. However, many of the criticisms voiced when the bill was first introduced have been corrected by amendment. Thus, for example, the definition of foreign power has been further narrowed; the certification procedure has been tightened by requiring that the person certifying the surveillance swear that the purpose of the surveillance is to obtain foreign intelligence information. Before information can be used in a subsequent trial, the trial court must again find that all statutory procedures have been met, and provide the defendant with access to portions of the material obtained. So if the Justice Department makes a decision, it is going to make all the information available to the defendant, spell out in careful detail the provisions that have been followed. If, as a result of the information, it is so sensitive, then the case will not be brought; but if it is going to be brought, all the information will be made available to the potential defendant.

An entirely new disclaimer has been substituted which limits any arguably inherent power that the President—and I direct this particular part of the testimony to the Senator from Maine and his inquiry—an entirely new disclaimer has been substituted which limits any arguably inherent power that the President may have to two situations designed in the bill. One, national security surveillance overseas, that would be, as this Committee understands, microwave communications and others; or any unprecedented, potentially harmful situations not contemplated by the Congress.

Now, we have framed that in such a way as to reach the outer limits in terms of any imaginable situation where it could be justified, and the bill is then specific to require that if the executive makes the determination that those circumstances are the case, they have to notify the Congress. I don't know, how do you get unprecedented, potentially harmful situations not contemplated by the Congress, and if they can meet that particular criteria, that it is so far removed or out of sight in terms of the possibilities; they still have to notify the Congress that they are going ahead, to move and fill the other requirements of the legislation.

Civil damage and criminal penalty sections have also been added. The definition of foreign intelligence information has been strengthened to require that the information sought is deemed necessary to the safety of the country and does not just relate to such safety. And any person acting pursuant to the direction of a foreign power must be a knowing actor.

With the continued cooperation of the administration, I am sure that further improvements can be made on the Senate floor, in the House and in the House-Senate Conference. For example, the definition of clandestine intelligence activity and whether such activity should encompass any type of noncriminal activity remains a troublesome point. I mentioned that to the Senator from Maine. I have indicated—and I know the Senator from Maryland will be here later, and I hope he will be questioned about it—but I have indicated that I would be glad to propose that any activity be criminal activity of some kind. I think it is unrealistic to think that we could do it, and I think it would be a great mistake to hold this legislation up to the point of depending upon action by the Congress in that area.

We can imagine the Attorney General—and I am sure the general spokesman can point out some of the areas which may leave some concern: Terrorist group plans to burn down a State capitol. That doesn't violate any kind of Federal law, and yet it would be the kind of area that might be so included. Intelligence activities, what the Russians are saying to the Czechs, and an American involved, in that particular situation where the law might not be violated.

But we have defined that in our report very, very closely and very tightly, and I have indicated that we would be glad to work—I would, certainly, and I think I speak for other members of the committee that support this—to try to introduce legislation which would further define its criminal activity. I don't think it should be in this particular circumstance. I think the Attorney General ought to be questioned closely on that area, but we have outlined, at least in building our record, the very narrow and precise area which may not be a violation of the law but which could fall within that area. I draw your attention and the staff's attention to that, and we would be glad to review the development of those particular provisions.

Mr. Chairman, there are those who argue that this bill is regressive and should be defeated. I disagree. Legislation can hardly be labeled regressive which for the first time places strict statutory controls on foreign intelligence electronic surveillance. The judicial warrant and executive certification procedures guarantee the type of external and internal controls which I and others have long advocated. Those who would defeat the bill because they are not satisfied with its warrant procedure ignore the fact that today there is no warrant requirement at all, there is no requirement at all, and that the courts currently have no role to play whatever in this area, and that the executive whim is presently the only controlling factor. That is the nature of the situation that we are facing today.

The fact of the matter is that for too long the American people have lacked any legal safeguards to protect them against the abuses of foreign intelligence electronic surveillance. Executive opposition has always led to congressional inaction. Until this year efforts at providing any safeguards were exercises in futility.



Now, finally, Mr. Chairman, the intelligence community does not favor this legislation. The intelligence agencies are suspicious of the warrant and certification procedures, and fear that such requirements will inhibit their surveillance capability. They prefer the old way of doing business, electronic surveillance by presidential fiat. And certain civil liberties groups did not like the legislation either. They view S. 3197 as an open invitation for the Government to engage in wiretaps and bugging. They remain steadfast in their opposition to all electronic surveillance.

Mr. Chairman, the Senate Judiciary Committee did not fashion this legislation to please either the intelligence community or the civil liberties groups. Rather, this bill is designed to strike a balance, and a careful balance that will protect the security of the United States without infringing on the constitutionality of protected liberties and rights of the American people. One should view this bill for what it is, a major effort by the Congress, long overdue, to place foreign intelligence electronic surveillance under the rule of law. This bill achieves that goal, and I urge its enactment.

Senator BAYH. Senator Kennedy, I appreciate your special effort in being here, and I know that you are very busy. You pointed out that there are differing opinions as to whether this bill really provides additional protections or an open door. Without getting into that debate, because I am certain that you are convinced in your convictions that it is providing safeguards, and that the goal of at least one member of this subcommittee is to do everything we can to provide safeguards; I would like to ask you to explain more fully two or three areas that I think are particularly sensitive.

Unless there are objections, I suggest we proceed on the normal 10 minute rule that the Chairman suggested, and you might keep a watch on the subcommittee chairman because he might forget his own watch.

There are two or three matters that really concern me that I understand are going to be clarified in the report language, if indeed there has been report language completed. It has not yet been made available to this subcommittee. That makes me rather nervous. Even if it is report language, there are some areas that are sensitive enough that I would ask the Senator to give particular attention to them to see if we couldn't include them in the specific language of the bill. Or perhaps the Senator might explain why report language is resorted to instead of specific language in delicate areas, such as the definition of clandestine activities which are not of an illegal nature.

How does the Senator from Massachusetts view these activities himself? He points out certain sorts of things that clearly could be law violations, like blowing up a State capitol. The way I understand the thrust of this is that there is a feeling in the intelligence community that certain other types of activities which fall short of that would still be encompassed in the definition of clandestine activities.

Senator KENNEDY. Well, first of all, let me just say, Mr. Chairman, it is an area which I am glad that this Committee is interested and concerned about. It should be. It is an area which we have tried to work on in a way to fashion a situation to insure that we are narrowing any possibility rather than opening up any potential area of difficulty.

As I say, we would be glad to—I would, I am sure the other members who support this would be glad to work with you and the members of this Committee in terms of the definition.

We have attempted, and I think you are quite right that wanting to evaluate either the report language, it is not report language as report language, and not legislative or statutory language. We have every intention, and I would welcome the opportunity to have your participation in fashioning the legislative history to insure and insist that this definition be as carefully drawn and be as precise as we can possibly make it.

In the fashioning of the language, we recognized at the outset that there are some activities which will not be criminal in nature, that would be so included. Then as I have indicated, in working with the Justice Department and exercising this particular issue, we think that that has been very well defined at least in terms of agreed language and the Justice Department will review that in detail, and we have spelled it out in the report, and that report will be made available.

I think your choice is whether you are going to refine this in a way that you are going to say that it will only include criminal activity. I for one feel that in any future Congress, even in this Congress, that I would introduce legislation to include any of those potential areas to be criminal activity. We are going to have to fashion hearings on it. We are going to have to examine those particular areas, but that seems to me to make the most sense. I do think that through statutory language, or in the report and legislative history, we can fashion such a definition here which is narrowing and confining and not broadening and expanding. It is an area in which I expressed concern to the President when he asked to meet with the members of the Judiciary Committee, as well as in the disclaimer area. It has been an area that we have worked on. We'll be glad to work with you.

I am satisfied, quite frankly, in those negotiations; in the record that has been made, and my understanding is that we have worked out a satisfactory definition, both from the statutory and what we intend to include in the report. And you should have our report language, and as I say, we would be more than glad to work with you to try and ensure that we are defining it and narrowing rather than expanding it.

Senator BAYH. Well, I don't want to nitpick and I certainly don't want to procrastinate as the Senator from Tennessee admonished us, but I think if we are talking about something which is important for us to be as specific as humanly possible. The Senator from Massachusetts pointed out that there are criminal fines involved, the first time is a unique adventure, an important adventure in describing the kind of crime and the width and breadth of it.

The same is true of the "knowingly aids and abets." Perhaps the way to approach this, at least temporarily, is to describe what is not covered. For example, I think it would not be a ridiculous interpretation to suggest that a citizen of this country who approaches a Member of Congress, pursuant perhaps to the request of an embassy regarding funds in a foreign aid bill might be covered. Although that is certainly an innocent act, and is well within the rights of an individual as far as political activity is concerned, that citizen might be covered. I think we make absolutely certain that that person is not inadvertently covered.

Senator KENNEDY. Well, the language is, "and, pursuant to the direction of a foreign power, must knowingly act."

Senator BAYH. Well, let's look at just one troubled spot on which there are mixed feelings. Suppose either an Arab or an Israeli embassy requests a citizen of this country to petition his or her Congressman. That person knowingly does what might be a perfectly harmless gesture, but it is at the direction and to the assistance and indeed at the initiation of the embassy.

Senator KENNEDY. I think you will find, Senator, that the specific language in this could not even at its further extension possibly reach any of that. I haven't got the excerpts of the counterpart here, but I would be glad to read those particular provisions.

Senator BAYH. Well, we don't need to pursue this.

Senator KENNEDY. Well, I think you would find that. But I think it is well to exercise any of those specific clauses against any kind of possible situation. The former 1968 Executive order on this in terms of the definition in meeting those three kinds of requirements is very, very strict. That has been the basis of the adoption for the definition here, and it seems to me that there may be ways of strengthening it.

Senator BAYH. Well, let's just look. I wanted to alert my colleague that that is an area that I am concerned about.

You mentioned how information that is brought to light pursuant to a search for foreign intelligence but results in bringing a criminal prosecution is handled, and that that is made available to the defendant. But is it not accurate that the legality of that tack will warrant initially procuring the information, that that information need not necessarily be made available to the defendant.

Senator KENNEDY. Well, the Senator would be correct. It would have to meet the other statutory provisions. No particular issue could be tested. It would have to meet the statutory provisions in terms that are laid out in the language and the information would have to be made available, then there would be compliance.

Senator BAYH. Well, I hope we can direct our attention to that particular decision which is made *in camera*, absent the defendant. Perhaps there are other safeguards that we could put in there. As I recall, the court may order evidence disclosed to the person against whom it is made, contingent upon the other provisions that the Senator referred to. I just think it is absolutely important that we tighten this up as much as we can.

One other area. If we are to have an oversight role, which I am sure the Senator from Massachusetts is as concerned about as I, should we try to find a way in which we can really have an oversight role that is meaningful? This bill prescribes report be made to Congress, but that only the number of taps which have been utilized. That is the only information made available. Is it unreasonable to suggest that other information be made available so that we can have a meaningful oversight task?

Senator KENNEDY. No, I think the Senator is quite correct. Also, as you know, Senator, over the period of the last 2 years there was a combination of different committees that had a series of hearings, the Muskie subcommittee of the Foreign Relations Committee, Senator Ervin's Committee on Privacy, as well as ours, in this whole area, and all we could get at were the particular numbers. We didn't know

when the numbers were going on, what period of time, the interpretation of the numbers, and obviously this Committee ought to be familiar with the nature and the direction, the purpose, of all of those matters. And I think that is explicit in the resolution that was passed, and I think it would be very, very helpful and an additional kind of safeguard, besides the safeguards which we have tried to put in to the bill.

As you know, in terms of the Executive that is going to sign off on this provision, that takes the advice and consent of the Senate. We will have a very good opportunity to examine this individual, determine their own kind of view and their understanding of these various kinds of provisions; so that anyone that is going to, at the President's behest, signoff is going to be extremely sensitized. I think we will have an opportunity on public record to get a very keen awareness of their understanding of these words, where they lead to, what the delimitations are. We will be on notice. We will have a chance to and certainly that ought to be a matter of great interest to the members of this Committee, and the Senate will have an opportunity to vote on that individual.

Senator BAYH. We'd also like to have the opportunity of the assistance, besides the Senator from Massachusetts, we have been asking questions of the previous Attorney General who shared his frustration at actually finding out what is happening in this sensitive area. I hope we give a bit more attention to that.

I think my time has expired.

Our distinguished ranking minority member, Senator Garn.

Senator GARN. Thank you very much, Mr. Chairman.

Senator Kennedy, I certainly agree with the general thrust of this bill and I do hope it passes. I am sure we can report it out so that it can be acted on on the Senate floor.

I commend you for introducing it.

Having said that, I do have some areas of concern and some questions. One of them is the area that Senator Bayh just started on, that and section 2527 where it only requires reports. Looking at our mandate as a new Committee under Senate Resolution 400, the specific purpose of having the Committee created was to stop abuses of the past in the intelligence area, and I feel it is our absolutely most important function. So already in our brief existence we have been struggling to write our own rules, to decide what kind of regulations and guidelines we will impose on the intelligence areas.

It seems to me that in this very important area of electronic surveillance, where this bill places controls for the first time, I have a little hard time, as you expressed, understanding the absolute opposition to the bill. The President at his whim can order it. It seems to me this is a very great step forward, to place some controls on it.

But to get back to my point, it seems to me that if we are to function in all areas of oversight that Senate Resolution 400 mandates that we do, this is an extremely important area where just mere numbers would not be of any meaning to us at all. We have already been privy to the most sensitive information about our national security. We will continue to be privileged to that very sensitive information, probably more than any other committee of the Congress. So I do feel very strongly about what Senator Bayh started

talking about, that this is an area where we ought to have some substantive reports on what they are doing. Is the information valid? Is it not? Is it helpful? Is it proper? And if it is not, why are we doing it? If it is not, how can we help improve it to actually gain information through electronic surveillance that will not only protect the rights of American citizens, but at the same time give us the possibility of obtaining good intelligence that will help the security of this country?

So it is an area that I don't think I need to pursue much further, but I do think that this is the committee that ought to have that oversight responsibility, and I would hope that this subcommittee can work on that and possibly you could help us in strengthening that particular provision.

Do you have any comments?

Senator KENNEDY. Well, I think these are questions that really could be targeted with the Justice Department in terms of—I think for the reasons you have outlined. It seems to me that your requests are entirely reasonable and completely consistent with my understanding of the resolution that was passed. And I think it would be an area which could be fashioned in such a way as to give you the most complete information, and I certainly support it.

I think that is a useful suggestion, and I would agree that the only value that we have in detecting the numbers is determining whether, sort of going up or going down. But beyond that the Congress had very little, we had very little information. As a matter of fact, we were denied it by the FBI. But I would agree with you that that is a worthwhile area.

Senator GARN. Well, even under the tightening of this law, there can still be some areas where, vague areas where some people express concern about this bill. The numbers wouldn't tell you about the quality, and that is really what I am getting at: how do we as an oversight Committee get at the quality? Are they going through the warrant process, getting permission, still getting some very shoddy information that may be of no use, and at the same time, infringing on people's rights? So it is an area I think we need to work on on the bill.

Senator KENNEDY. That's right.

Senator GARN. Another area that I wonder about is if you could outline for me why it is necessary to have a specific disclaimer on the inherent power of the President in the bill. I know there was some concern that this may be a loophole in the particular bill. Could you amplify that for me?

Senator KENNEDY. Well, Senator, there is a matter of very considerable concern by moving into this area by the Congress, legislating in it, whether we are recognizing the inherent power of the President in the areas in which we are not moving into. If we define in terms of the definition of the statute, that we feel that we have got certain power in this area, as the Congress and as the Attorney General has stated that we do, it is an open constitutional issue as to the extent and the limitations of executive power to go beyond that. And that is the constitutional issue that has been rather gray. It hasn't been really clearly defined.

So there are many even distinguished constitutionalists who think that that area of executive power, inherent power, moving into that

is narrow. There are others that think it is quite broad. And rather than trying to make through any statutory definition a prejudgment of that issue, we have tried to make it as neutral as the words could possibly be fashioned to continue to leave that as an open area that is going to have to be defined by the Supreme Court, and without judging whether the inherent power in that area is as broad as some believe, or as narrow.

That is a sticky issue. It is a sticky question. You could take five of the most distinguished constitutional authorities and lawyers, and they would vary in terms of their judgment on authority. I believe that that ought to be decided by the Supreme Court of the United States, and it ought to be made on the basic kind of inherent power of the President; that we should not, by legislation or statute, try to pre-judge what that area is.

There are some that would like to. Some believe that even by doing this that we are infringing on it. The Attorney General, the present Attorney General thinks that even in this area, that the President has inherent power, and therefore in any of the things that we are covering, he has the inherent power, and therefore they don't need any statutory authority. But he is prepared to say, we are prepared to give that up and recognize the power of the Congress to move into this area, and we are glad to work out and fashion safeguards, which I think is extraordinarily forthcoming. There are those that don't think it is a forthcoming position. I believe it is.

And I think they deserve credit. And with that language and the approval of any future Attorney General, we can ask if they subscribe to this as well. And I think quite realistically any future Attorney General is going to follow this precedent.

And so I think that we have defined that in a way which I find encouraging. There are those that say, "Well, if we do it, even though we are limiting the executive power in this area, you know, there may be these other features of it which may be troublesome or bothersome from another point of view, from a civil liberties point of view, and therefore we should not take that step." This is basically the question which we have to—

Senator GARN. Well, I agree, we are trying to walk a fine line and not trying to take either side, but what would be the effect of leaving section 2524 out and not saying anything about it?

Senator KENNEDY. Well, the effect of that would be, I think, it throws the fat in the fire, so to speak, among many different groups. Some feel that without it we are limiting the inherent power of the President, therefore they are opposed to it. Others feel that we are defining it in such a way that we are infringing on it. And I think we have tried to take as about a neutral position as we possibly could on that issue.

Senator GARN. Thank you. I have no other questions.

Senator BAYH. Senator Hathaway.

Senator HATHAWAY. Thank you very much, Mr. Chairman.

Senator Kennedy, on this point, as the chief sponsor of the bill, what is your own opinion with respect to the President's inherent power? Do you believe that he has the power to conduct wiretapping and bugging beyond the circumstances that have been set out in this bill?

Senator KENNEDY. I would say no I don't.

Senator HATHAWAY. I will only ask you one other question.

With the regard to the powers, I don't have too much quarrel with any of them except for one that says "or the conduct of foreign affairs of the United States." That seems to be a very, very broad power to conduct wiretapping and bugging. If that were modified considerably, it would help with respect to my judgment of the bill, and it also would help on minimization problems. All of the others, hostile attacks from foreign powers, agents put out for the security or national defense of the nation or to protect the national security against foreign intelligence activities, it seems to me, are all about one category where we are maintaining our national defense. But it seems to me the authority to conduct surveillance just for the conduct of foreign affairs of the United States—

Senator KENNEDY. It has the words "essential to the foreign affairs," but we would be glad to work with you.

Senator HATHAWAY. Is that a change? My print says only "conduct of foreign affairs" on page 7, on section 2524, but maybe it has been changed since I got it.

But even if it said "essential to the conduct"—

Senator KENNEDY. Well, I think it is in the original one, Senator, but I will be glad to—line 24, page 3, it says, "deemed essential."

Senator HATHAWAY. But even so, since it is still on the certification, that still is a pretty broad power. I just wonder if it was discussed in the Judiciary Committee, and whether there was broad support of that provision or not?

Senator KENNEDY. We will be glad to work with you on that. It would seem that those words, "essential", were strong enough. Perhaps there are other words of art.

Senator HATHAWAY. Well, you know, "essential to the conduct of the foreign affairs of the United States" is a pretty broad range. For example a conversation that an individual could have with some foreign embassy with respect to our economy I suppose could be essential to the conduct of the foreign affairs of the United States; or just any subject matter whatsoever, I would think, could be deemed essential to the conduct of foreign affairs, even though you might not have any knowledge. I would appreciate any suggestions you might have on modifying that or tightening it up so that we don't cover too much ground that isn't necessary to cover, because we all have in mind that we shouldn't be invading the privacy of citizens if we can possibly avoid it.

Senator KENNEDY. Well, the Senator is right in raising it, of course. That falls within the other paragraphs, and you still are talking about an agent of a foreign power who is operating at the direction of a foreign power, who is also engaged in clandestine intelligence activities. We have outlined that amidst the others—sabotage or terrorist activities; who also conspires knowingly and is engaging in such activities—and then where it, you know, goes down in terms of the information, we reach the particular point that you reach. But you are also talking about an individual, before you even get there, that has met the other kinds of criteria. But I would be glad to work with you.

Senator HATHAWAY. But it could be an American citizen subject to surveillance.

Senator KENNEDY. But he would still have to be working "at the direction" and in "clandestine activities," and these others, and then falls within these matters that are essentially foreign. But we are glad to work with you in terms of clearing that up and making it tighter.

Senator HATHAWAY. The only other question I have is the mechanics of the probable cause hearings. It seems to me that the judge is unnecessarily precluded from going into the basis for the certification. I wonder what the thinking was on the Judiciary Committee for simply allowing the probable cause or the warrant to issue on the basis of certificate from the Attorney General that one of these purposes is met, and that the information is necessary. I know he can require additional documents. Does that mean that the judge can call witnesses and have him testify to ascertain further what is behind the certification?

Senator KENNEDY. Well, under the procedures which have been allowed, it is the President and his designee, and he has to designate. That follows the other procedures which I have outlined earlier, and reaches the other kinds of requirements under the definitions of the provisions, and makes the certification in terms of the court procedures which we have outlined here. There are some who say, well, should we follow, you know, are we just doing it with the seven justices? But it has to be in writing, it has to meet the other kind of certification requirements, but it does not provide for other outside witnesses to come in and be heard *in camera*. It is limited in terms of the certification by the Executive on the basis of probable cause.

Senator HATHAWAY. Well, what is your opinion? Do you think the judge should be able to call on the witnesses?

Senator KENNEDY. Well, I think it is a close issue, Senator. It is a close issue. I think on the one hand, if you had a preference on this, I would prefer it the way there would be the opportunity to close. You have to ask if you do not, are there still sufficient guarantees that are spelled out within the system to make it objectionable? I would say if it was just a matter of preference on my part, that they be called, but I don't think that the fact that they are not violates or makes it an unacceptable or objectionable procedure.

Senator BAYH. Would the Senator permit me, just to make certain because I think this is a very critical point, and one I think we could work out. Do I understand the Senator from Massachusetts as saying that once the certification has been made, that then the judge in question is precluded from looking behind that certification? If we are concerned about an Attorney General or his designee, once they have certified, we cannot test that standard. Is that the thrust of the Senator's concern? That is critical.

Senator HATHAWAY. Yes, that's right.

Senator KENNEDY. Senator, just a point that I would make at this time. The way that this procedure was fashioned was to try to take an internal accountability, which is to take a finding either by the Executive which meets the requirements under the legislation in terms that they go to the court and make the certification, and based upon that certification, meet their requirements under the statute. On the issue of the probable cause, of course, the judge has absolute discretion about how many witnesses he wants to hear and who he wants to hear from on any of those particular matters.

So on that particular issue about the probable cause, it is wide open in terms of what the judge wants to hear, who he wants to hear



from, any range of witnesses they want to have. On the internal kind of certification, it is based strictly upon the executive branch under the procedures which have been outlined. So they are not witnesses on the questions of certification, but reaching the question of probable cause, it is completely open to the justice in terms of—

Senator HATHAWAY. Well, it seems to me from reading it—perhaps I am not reading it correctly—that in order to get a warrant you just have to have a certificate stating that, for example, the information is needed for the essential conduct of foreign affairs of the United States and it can't be obtained by any other means; and that the judge cannot go behind that certification to determine whether it is actually needed for the conduct of foreign affairs, or that it can't be obtained by any other means. Perhaps the judge is really confined in his probable cause judgment of whether the particular individual or organization that they want to have surveillance over has that information.

Senator KENNEDY. Well, the Senator is correct on the one hand about looking behind the question of the certification, but the language here on page 8 says that the judge may require the applicant to furnish other information or evidence that may be necessary to make the determinations under 2525, which is the issuance of the order, and reaching the probable cause provisions. It leaves it completely up to the judge as to the other information that they may require on it. It does not go behind the question to the certification, but does give the flexibility to the judge in this area.

Senator HATHAWAY. Well, I have 30 seconds left, so I guess I will yield back my time.

Thank you, Senator.

Senator BAYH. The Senator from New Jersey.

Senator CASE. I pass at this time. Thank you.

Senator BAYH. The Senator from Delaware?

Senator BIDEN. Thank you, Mr. Chairman.

I have a number of questions but it seems to me that from what I have heard thus far, the Senator from Massachusetts is saying that there are an awful lot of things he would like in the bill that aren't in the bill, but this is the best that we are going to get, and what we are going to get in this bill is much better than what we have.

Is that essentially correct?

Senator KENNEDY. Well, that is it, Senator. You have absolutely no protection whatsoever at the present time, absolutely none. It is very meaningful and important bite of the apple that we are taking on it, and I think that is about the extent that you are going to be able to. The issue obviously is whether even by making the progress that we are, are we endangering or threatening any human rights or liberties?

Senator BIDEN. The Senator has responded with regard to the inherent powers question, Americans who might be subject to surveillance, congressional access, the requirement or the suggestion of making the requirement that there be criminal acts, and the oversight question. He has responded in a way that indicates that had he total latitude, he would broaden those provisions, or narrow them, depending on the perspective of the question.

So I don't really see much sense, at least from my standpoint, in taking more of the Senator's time. I think he has made the point.

fairly clear, that this is all we are likely to get, and we are lucky to get this much.

Senator KENNEDY. Well, I would say, Senator, that I think it is a good bill, too.

Senator BIDEN. I am not suggesting, Senator, that I don't think it is a good bill. But there are those of us who, when we first became acquainted with the bill, not being familiar with this field as long and with as much background as the Senator from Massachusetts has been, that upon first reading, that I was very, very moved by the criticisms of the ACLU and other civil libertarian groups saying, "Oh my God, this isn't such a hot idea." But after reading the entire bill and all the background that I could lay my hands on, and hearing the Senator this morning, I am more convinced that it is much, much better than what we have, which is nothing now; and that maybe the best thing we should do is what the Senator suggested, is pass this now and work like heck to see to it that the stronger provisions that the Senator from Massachusetts and the Senator from Delaware and others would like very much in the bill, keep nibbling at that apple.

So I won't take any more of the Senator's time.

Senator CASE. Would the Senator, before he yields entirely, yield to me?

Senator BIDEN. Sure.

Senator CASE. I would like to see whether one of the advantages which we get from this bill is not that a record is made of wiretaps and that it is at least reviewable by a court and a judge. There isn't going to be any more of this anonymous business as far as the executive branch getting into this field. There is concern about it.

Sometime I expect there will be an availability of all of this material and the record of these proceedings for scrutiny to determine, *ex post facto*, if you will, but nevertheless in a very important way; whether discretion has been abused, whether the powers of Government have been abused, is that not correct?

Senator KENNEDY. The Senator is quite, quite correct in this. We are getting accountability in a very important area which accountability is virtually nonexistent, both in the courts and also within the executive. You are going to find in any time when there is a certification, there is an individual who is going to have signed off. You are going to know who that individual is, both from an executive point of view and from the court's point of view. This bill hopefully establishes the kind of respect in this area which I think is warranted and justified. I think without this legislation, this is still going to be a very open, grey, fuzzy area which can invite transgressions in ways which we have seen in the very recent past, and which without this legislation, could very well continue. I think this is part of the reason and the justification for it.

Senator CASE. In other words, we are not going to have a situation where we are going to have to depend upon the accidental discovery of tapes.

Senator KENNEDY. The Senator is quite correct.

Senator BIDEN. Senator, before you yield back all of my time, I would like to ask one more question that doesn't deal directly with the bill.

Those of us who are most concerned and feel that there should be a requirement of a criminal violation are met with the counter-argument that there are many things lacking in our present criminal code and revising the espionage laws which should in fact be included as violations but are not now. I would like to ask the Senator for his best political judgment, as one of the ranking members of the Judiciary Committee, as to whether or not, absent whether or not this bill is passed, how long will it take for us in the Congress to be able to get around to altering or revising those espionage laws, which seems to be an antecedent requirement in order to include the requirement in this bill of criminal violations?

Senator KENNEDY. I think it is absolutely imperative that there be a redrafting of the criminal code. The one that was done in S. 1 is obviously completely unacceptable, but I think that has to be one of the first priorities in terms of the Criminal Laws Subcommittee. I don't happen to be chairman of it, but I would think that there has to be an extremely important effort for the redrafting of the whole criminal code, and that is going to be a major undertaking. I think it is imperative that we do it, and I strongly support including any of these areas as violations and crimes, and I will work with the Senator from Delaware and others in insisting on it.

I think in the meantime, that we can either through statute or the report and legislative history of this Committee, make it very, very clear what those areas are, hopefully. But I think this is where it is going to have to be done.

Senator BIDEN. One last comment. I don't want to leave the Senator from Massachusetts with the impression that as a member of this Committee I won't suggest that we attempt to nibble further away at some of the changes that we in fact, or that I in fact, would like to see, and that the Senator from Massachusetts would apparently like to see, but I was just paraphrasing what I thought the Senator from Massachusetts was saying.

Senator KENNEDY. Fine.

Senator BIDEN. Thank you.

Senator BAYH. Are you through nibbling?

Senator BIDEN. Yes, I am through nibbling.

Senator BAYH. Thank you, Senator.

Senator Baker, do you have any questions?

Senator BAKER. Mr. Chairman, I have no questions. I apologize to you and the subcommittee and to Senator Kennedy for not being present for the entire hearing, but as I indicated earlier, I had another executive session to attend this morning.

I might reiterate briefly what I intended to say earlier, and that is that this is the first legislative effort of this Committee, and the first activity of this subcommittee, and while it is urgent and important that we consider the matter carefully and do our best to balance the requirements of the competing forces, I think it is also urgent that we move promptly on this matter. I notice that there are 3 days set aside for hearings and briefings, and I would very much hope that immediately after that we would turn our attention to the matter of considering a bill for reporting to the Senate for action.

I commend Senator Kennedy for his initiative in this respect. I listened with great care to the questions by Senator Biden. It is no

secret to any of us who have worked in this field to know that the Constitution is exquisitely imprecise in its definition of the presidential authority in this and other respects, and it is in the nature of compromise, I suppose, if one considers that the President may have authorities even beyond or in spite of the statute, depending on what the Supreme Court might finally say. It is the hallmark of good faith and good conscience, I think, that an effort was made to reconcile those differences voluntarily between the executive branch and the legislative, and that is precisely what Senator Kennedy has done, and I think he has done a good job of it.

Senator BAYH. Well, I have no further questions. I know the Senator is busy.

Anybody else?

Thank you very much. We appreciate working with you and trying to iron out some of these differences that we may have. And we will proceed without delay, recognizing that this is sort of a precedent that we are establishing, that we must be thorough, and we are attempting to do that.

Our witness is the Senator from Maryland, Senator Mathias.

#### **TESTIMONY OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND**

Senator MATHIAS. Mr. Chairman, I have had the privilege of being present during much of Senator Kennedy's testimony, the questions have been asked of him, and I must say that I think Senator Biden's comment—

Senator BAKER. Mr. Chairman, could we suspend for just a minute? I can't hear while we have the competition from the Maryland delegation.

Senator MATHIAS. I thought you meant there was a Maryland delegation leaving the room.

Senatory BAYH. Senator, I think you can proceed now.

Senator MATHIAS. I was about to remark that I think Senator Biden's comment was comprehensive and almost precludes the need for anything further, that this bill is not as good as it ought to be, but that it is about as good as we are going to get, and it is vastly better than the current situation. And I can hardly improve on that. I will attempt to embroider it a little, but I would save the Committee's time and request that my statement might be included in full in the record, and then I will comment briefly on it.

Senator BAYH. The Senator is free to proceed as he sees fit, but having served with him on the Judiciary Committee and knowing of his sensitivity in this area, I would hope that in his testimony or in questions—perhaps I should reserve this as a question, but if it is not contained in the Senator's statement, I would like to have his judgment relative to how you would proceed to make this better. I mean, I have great respect for his judgment, and I know that he, like the Senator from Massachusetts, is very sensitive.

We fought a lot of these civil liberties battles. Give us your advice and counsel as someone who has labored in this area, if you would, please.

[The prepared statement of Senator Mathias follows:]

PREPARED STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR,  
FROM THE STATE OF MARYLAND

Mr. Chairman, I appreciate your invitation to testify this morning on S. 3197, the Foreign Intelligence Surveillance Act of 1976.

As a sponsor of this legislation, and as a member of the predecessor Select Committee on Intelligence—which conducted the first comprehensive factual investigation of the use of wiretaps and bugs in both foreign and domestic intelligence cases—I am pleased to express my support for this bill.

I have long been deeply concerned with the dangers to our liberties—and the erosion of the Fourth Amendment to the Constitution—raised by the practice of wiretapping and bugging American citizens without a judicial warrant in so-called “national security” cases.

More than two years ago, on May 2, 1974, I introduced in the 93rd Congress, the Bill of Rights Procedures Act, S. 3440, which was designed to enforce the protections of the Bill of Rights by requiring a court order for many forms of governmental surveillance—including mail opening, the entry of homes, and the inspection of bank, credit, and medical records, as well as the use of bugs and wiretaps.

In the present 94th Congress, on June 5, 1975, more than a year ago, I again introduced the Bill of Rights Procedures Act. A copy of this Act, S. 1888, and my remarks on its introduction are appended to my statement as an exhibit, and I ask the Chairman's permission that they be printed in the transcript following my remarks this morning.

The need for this legislation is clear. The factual basis for new procedures to regulate the use of bugs and wiretaps against Americans was carefully and comprehensively documented in the recently published Final Report of the Select Committee on Intelligence. As we stated in our Final Report:

“Since the early 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant. Recent court decisions have curtailed the use of these techniques against domestic targets. But past subjects of these surveillances have included a United States Congressman, a Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam War protest group. While the prior written approval of the Attorney General has been required for all warrantless wiretaps since 1940, the record is replete with instances where this requirement was ignored and the Attorney General gave only after-the-fact authorization.”

Beginning with President Franklin Roosevelt in 1940, every Administration has asserted the right to, and has conducted, warrantless wiretapping and bugging of Americans in national security cases.

President Ford and Attorney General Levi deserve great credit for breaking with this long-standing Executive Branch tradition by submitting this legislation to the Congress.

In the absence of the check provided by the judicial warrant requirement in this bill, national security wiretaps and bugs have been subject to grave abuse. Three examples investigated by the Select Committee illustrate the very real dangers in warrantless electronic surveillance.

First, between January 1964 and October 1965, the FBI—acting under general authority issued ten years earlier by the Attorney General—conducted micro-phone surveillance against Dr. Martin Luther King, Jr. As the Select Committee documented, these bugs were placed not for any national security reason, but solely and simply to obtain personal information about Dr. King.

Second, as we stated in the Report of the Select Committee, “The so-called ‘seventeen’ wiretaps on journalists and government employees, which collectively lasted from May 1969 to February 1971, also illustrate the intrusiveness of electronic surveillance. According to former President Nixon, these taps produced ‘just gobs of material: gossip and bull.’ FBI summaries of information obtained from the wiretaps and disseminated to the White House suggest that the former President's private evaluation of them was correct. This wiretapping program did not reveal the source of any leaks of classified data, which was its ostensible purpose, but it did generate a wealth of information about the personal lives of the targets—their social contacts, their vacation plans, their employment satis-

factions and dissatisfaction, their marital problems, their drinking habits, and even their sex lives. Among those who were incidentally overheard on one of these wiretaps was a currently sitting Associate Justice of the Supreme Court of the United States, who made plans to review a manuscript written by one of the targets. Vast amounts of political information were also obtained from these wiretaps."

Third, the incidental collection of political information from electronic surveillance is also shown by a series of telephone and microphone surveillances conducted in the early 1960's. In an investigation of the possibly unlawful attempts of representatives of a foreign country to influence congressional deliberations about sugar quota legislation in the early 1960's, the Attorney General authorized a total of twelve warrantless wiretaps on foreign and domestic targets. Among the wiretaps of American citizens were two on American lobbyists, three on executive branch officials, and two on a staff member of a House of Representatives' committee. A bug was also planted in the hotel room of a United States Congressman, the Chairman of the House Agriculture Committee, Harold D. Cooley.

In this "Sugar Lobby" investigation, wiretaps were placed on ten telephone lines of a single law firm. Such wiretaps represent a serious threat to the attorney-client privilege. The wiretapping of American journalists and newsmen—at least six such cases were uncovered by our investigation since 1960—inevitably tends to undermine the First Amendment guarantee of a free press.

As these examples show, even though the ostensible purpose of the electronic surveillance was foreign intelligence, the rights and the privacy of Americans engaged in purely domestic political or personal matters were frequently violated.

Above all, these examples show that the central problem was a failure of the procedures then in use to prevent abuse. As the history of our common law and the provisions of the Constitution teach, procedure is often the surest safeguard against abuse and the use of a judicial warrant requirement is a keystone of the Fourth Amendment's procedural protections.

The Supreme Court affirmed this point in the Keith case where it declared:

"The fourth amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government."

The bill before you today establishes the important principle that an impartial magistrate outside the Executive Branch and the intelligence community must authorize electronic surveillance in foreign intelligence or national security cases.

In addition, the bill contains other important and valuable safeguards against abuse:

A judge may issue a warrant only where he finds that there is probable cause to believe that the target of the wiretap or bug is a foreign power or the agent of a foreign power. The intent of this requirement is to authorize electronic surveillance only where an American is acting under the direction and control of a foreign power. Merely being in contact with representatives of a foreign government—as, for example, when Americans of Greek, Irish, or Jewish extraction legitimately seek to influence U.S. policy towards the country of their ethnic origin and are in touch with such countries representatives—would not permit a finding that they were the agent of a foreign power unless they were acting under its control rather than out of a common concern.

The judge must also find probable cause that the target is engaged in "clandestine intelligence activities." Some have criticized this provision because it would allow electronic surveillance of an American who was not involved in criminal activity. The Select Committee, in its Recommendation No. 52, which I supported, recommended that a criminal standard obtain for foreign intelligence surveillance, as my Bill of Rights Procedures Act provides. The Select Committee also recognized, however, that the current espionage laws do not prohibit certain activity, such as industrial espionage, which the U.S. has a legitimate counter-intelligence interest in monitoring. The Select Committee recommended that the espionage laws be modernized to cover this fairly limited area of currently non-criminal activity.

The Congress, and this and other relevant Committees, should examine the espionage laws to determine if this is feasible without risking too broad or too vague a criminal prohibition. When that is done, the standard of the criminal law can be imposed in foreign intelligence electronic surveillance. But that cannot be done today. Yet today we can establish the warrant procedure by supporting this bill.

The warrant procedure is at the heart of the fourth amendment. By supporting this legislation, we can root that procedure in the law while we continue to work for a criminal law standard.

For we should not underestimate the major advance this bill represents. No previous President and Attorney General has ever supported the principle of a warrant requirement in this area. We have no guarantee that a future President will give his support to such legislation. We should not let this chance to write new law—with its highly desirable provisions of a judicial warrant, controls over the use and dissemination of the surveillance product, and, of great importance to this Committee particularly, the submission of annual reports to the Congress which will serve as the basis for oversight investigations—slip from our fingers.

Finally, allow me to stress three points. First, many of the seeming problems posed by the lack of a criminal law standard can be dealt with by clear statements in the committee reports and other legislative history. We can make clear, in a way that necessarily can not be articulated in statutory language, just what is and what is not intended to be authorized. That is what I have sought to do by the example I cited earlier with respect to Americans acting out of common concern for the country of their ethnic extraction. That example can be amplified and others added—a process several of us on the Judiciary Committee are presently accomplishing in our report on this bill.

Second, the provision of this bill concerning the reservation of Presidential power, which some have criticized, is not, in my opinion, sufficient grounds for opposing this bill. As the Attorney General has pointed, this provision does not open a loophole or create blanket authority for presidential wiretapping. Rather, it is simply a recognition that this bill is designed to regulate surveillance of communication within the United States. Different problems and different procedures may be called for with respect to the monitoring of international communications or of the communications of Americans overseas. But this legislation should not be blocked—dealing as it does with the critically important area of citizens communications in the United States—while legislation is developed for international communication. And, most significantly, the Presidential Power provision does not have to be the last word on this subject. In the Final Report of the Select Committee, we made recommendations for new legislation to regulate the surveillance of international communications and of Americans overseas. When enacted, such legislation can preempt the field and this reservation of Presidential power.

Finally, the Congress, in voting to create this Committee, clearly contemplated a new order in Congressional oversight and review of intelligence activity by the Executive Branch. You have the means, the opportunity, and the support of the Congress to vigorously watchdog the enforcement of this legislation. That is perhaps the surest safeguard against abuse. As the Baltimore pundit H. L. Mencken observed, "Conscience is the inner voice that warns us somebody may be looking."

For all of the reasons cited above, I urge you to favorably consider this bill. Thank you.

Senator MATHIAS. Well, I will, Mr. Chairman. I would also make this request to you, that on November 6, 1975, Attorney General Levi, at the request of the Select Committee, appeared before the Select Committee and gave a very comprehensive and scholarly review of the state of the law as it applied to the fourth amendment. It was a remarkable performance, it was a thoughtful performance, and I would request that that statement by the Attorney General, which appears in Volume V of the hearings on the NSA, be included as a part of my testimony here today. I believe it will be helpful to the Committee.

Senator BAYH. Without objection.

Senator CASE. I wonder also, Mr. Chairman, if individual members of the Committee could have that distributed to them.

Senator BAYH. I think it would be a very good idea.

[The document referred to follows:]

PREPARED STATEMENT OF HON. EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES

Before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, November 6, 1975

I am here today in response to a request from the Committee to discuss the relationship between electronic surveillance and the Fourth Amendment of the Constitution. If I remember correctly, the original request was that I place before the Committee the philosophical or jurisprudential framework relevant to this relationship which lawyers, those with executive responsibilities or discretion, and lawmakers, viewing this complex field, ought to keep in mind. If this sounds vague and general and perhaps useless, I can only ask for indulgence. My first concern when I received the request was that any remarks I might be able to make would be so general as not to be helpful to the Committee. But I want to be as helpful to the Committee as I can be.

The area with which the Committee is concerned is a most important one. In my view, the development of the law in this area has not been satisfactory, although there are reasons why the law has developed as it has. Improvement of the law, which in part means its clarification, will not be easy. Yet it is a most important venture. In a talk before the American Bar Association last August, I discussed some of the aspects of the legal framework. Speaking for the Department of Justice, I concluded this portion of the talk with the observation and commitment that "we have very much in mind the necessity to determine what procedures through legislation, court action or executive processes will best serve the national interest, including, of course, the protection of constitutional rights."

I begin then with an apology for the general nature of my remarks. This will be due in part to the nature of the law itself in this area. But I should state at the outset there are other reasons as well. In any area, and possibly in this one more than most, legal principles gain meaning through an interaction with the facts. Thus, the factual situations to be imagined are of enormous significance.

As this Committee well knows, some of the factual situations to be imagined in this area are not only of a sensitive nature but also of a changing nature. Therefore, I am limited in what I can say about them, not only because they are sensitive, but also because a lawyer's imagination about future scientific developments carries its own warnings of ignorance. This is a point worth making when one tries to develop appropriate safeguards for the future.

There is an additional professional restriction upon me which I am sure the Committee will appreciate. The Department of Justice has under active criminal investigation various activities which may or may not have been illegal. In addition, the Department through its own attorneys, or private attorneys specially hired, is representing present or former government employees in civil suits which have been brought against them for activities in the course of official conduct. These circumstances naturally impose some limitation upon what it is appropriate for me to say in this forum. I ought not give specific conclusory opinions as to matters under criminal investigation or in litigation. I can only hope that what I have to say may nevertheless be of some value to the Committee in its search for constructive solutions.

I do realize there has to be some factual base, however unfocused it may at times have to be, to give this discussion meaning. Therefore, as a beginning, I propose to recount something of the history of the Department's position and practice with respect to the use of electronic surveillance, both for telephone wiretapping and for trespassory placement of microphones.

As I read the history, going back to 1931 and undoubtedly prior to that time, except for an interlude between 1928 and 1931, and for two months in 1940, the policy of the Department of Justice has been that electronic surveillance could be employed without a warrant in certain circumstances.

In 1928 the Supreme Court in *Olmstead v. United States* held that wiretapping was not within the coverage of the Fourth Amendment. Attorney General Sargent had issued an order earlier in the same year prohibiting what was then known as the Bureau of Investigation from engaging in any telephone wiretapping for any reason. Soon after the order was issued, the Prohibition Unit



was transferred to the Department as a new bureau. Because of the nature of its work and the fact that the Unit had previously engaged in telephone wiretapping, in January 1931, Attorney General William D. Mitchell directed that a study be made to determine whether telephone wiretapping should be permitted and, if so, under what circumstances. The Attorney General determined that in the meantime the bureaus within the Department could engage in telephone wiretapping upon the personal approval of the bureau chief after consultation with the Assistant Attorney General in charge of the case. The policy during this period was to allow wiretapping only with respect to the telephones of syndicated bootleggers, where the agent had probable cause to believe the telephone was being used for liquor operations. The bureaus were instructed not to tap telephones of public officials and other persons not directly engaged in the liquor business. In December 1931, Attorney General William Mitchell expanded the previous authority to include "exceptional cases where the crimes are substantial and serious, and the necessity is great and [the bureau chief and the Assistant Attorney General] are satisfied that the persons whose wires are to be tapped are of the criminal type."

During the rest of the thirties it appears that the Department's policy concerning telephone wiretapping generally conformed to the guidelines adopted by Attorney General William Mitchell. Telephone wiretapping was limited to cases involving the safety of the victim (as in kidnappings), location and apprehension of "desperate" criminals, and other cases considered to be of major law enforcement importance, such as espionage and sabotage.

In December 1937, however, in the first *Nardone* case the United States Supreme Court reversed the Court of Appeals for the Second Circuit, and applied Section 605 of the Federal Communications Act of 1934 to law enforcement officers, thus rejecting the Department's argument that it did not so apply. Although the Court read the Act to cover only wire interceptions where there had been disclosure in court or to the public, the decision undoubtedly had its impact upon the Department's estimation of the value of telephone wiretapping as an investigative technique. In the second *Nardone* case in December 1939, the Act was read to bar the use in court not only of the overhead evidence, but also of the fruits of that evidence. Possibly for this reason, and also because of public concern over telephone wiretapping, on March 15, 1940, Attorney General Robert Jackson imposed a total ban on its use by the Department. This ban lasted about two months.

On May 21, 1940, President Franklin Roosevelt issued a memorandum to the Attorney General stating his view that electronic surveillance would be proper under the Constitution where "grave matters involving defense of the nation" were involved. The President authorized and directed the Attorney General "to secure information by listening devices [directed at] the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies." The Attorney General was requested "to limit these investigations so conducted to a minimum and to limit them insofar as possible as to aliens." Although the President's memorandum did not use the term "trespassory microphone surveillance," the language was sufficiently broad to include that practice, and the Department construed it as an authorization to conduct trespassory microphone surveillances as well as telephone wiretapping in national security cases. The authority for the President's action was later confirmed by an opinion by Assistant Solicitor General Charles Fahy who advised the Attorney General that electronic surveillance could be conducted where matters affected the security of the nation.

On July 17, 1946, Attorney General Tom C. Clark sent President Truman a letter reminding him that President Roosevelt had authorized and directed Attorney General Jackson to approve "listening devices [directed at] the conversation of other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies" and that the directive had been followed by Attorneys General Robert Jackson and Francis Biddle. Attorney General Clark recommended that the directive "be continued in force" in view of the "increase in subversive activities" and "a very substantial increase in crime." He stated that it was imperative to use such techniques "in cases vitally affecting the domestic security, or where human life is in jeopardy" and that Department files indicated that his two most recent predecessors as Attorney General would concur in this view. President Truman signed his concurrence on the Attorney General's letter.

According to the Department's records, the annual total of telephone wiretaps and microphones installed by the Bureau between 1940 through 1951 was as follows:

Telephone wiretaps:		Microphones:	
1940-----	6	1940-----	6
1941-----	67	1941-----	25
1942-----	304	1942-----	88
1943-----	475	1943-----	193
1944-----	517	1944-----	198
1945-----	519	1945-----	186
1946-----	364	1946-----	84
1947-----	374	1947-----	81
1948-----	416	1948-----	67
1949-----	471	1949-----	75
1950-----	270	1950-----	61
1951-----	285	1951-----	75

It should be understood that these figures, as in the case for the figures I have given before, are cumulative for each year and also duplicative to some extent, since a telephone wiretap or microphone which was installed, then discontinued, but later reinstated would be counted as a new action upon reinstatement.

In 1952, there were 285 telephone wiretaps, 300 in 1953, and 322 in 1954. Between February 1952 and May 1954, the Department's position was not to authorize trespassory microphone surveillance. This was the position taken by Attorney General McGrath, who informed the FBI that he would not approve the installation of trespassory microphone surveillance because of his concern over a possible violation of the Fourth Amendment. FBI records indicate there were 99 installed in 1954. The policy against Attorney General approval, at least in general, of trespassory microphone surveillance was reversed by Attorney General Herbert Brownell on May 20, 1954, in a memorandum to Director Hoover instructing him that the Bureau was authorized to conduct trespassory microphone surveillances. The Attorney General stated that "considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest."

A memorandum from Director Hoover to the Deputy Attorney General on May 4, 1961, described the Bureau's practice since 1954 as follows: "[I]n the internal security field, we are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activities of Soviet intelligence agents and Communist Party leaders. In the interests of national safety, microphone surveillances are also utilized on a restricted basis, even though trespass is necessary, in uncovering major criminal activities. We are using such coverage in connection with our investigations of the clandestine activities of top hoodlums and organized crime. From an intelligence standpoint, this investigative technique has produced results unobtainable through other means. The information so obtained is treated in the same manner as information obtained from wiretaps, that is, not from the standpoint of evidentiary value but for intelligence purposes."

The number of telephone wiretaps and microphones from 1955 through 1964 was as follows:

Telephone wiretaps:		Microphones:	
1955-----	214	1955-----	102
1956-----	164	1956-----	71
1957-----	173	1957-----	73
1958-----	166	1958-----	70
1959-----	120	1959-----	75
1960-----	115	1960-----	74
1961-----	140	1961-----	85
1962-----	198	1962-----	100
1963-----	244	1963-----	83
1964-----	260	1964-----	106

It appears that there was a change in the authorization procedure for microphone surveillance in 1965. A memorandum of March 30, 1965, from Director Hoover to the Attorney General states that "[i]n line with your suggestion this morning, I have already set up the procedure similar to requesting of authority for phone taps to be utilized in requesting authority for the placement of microphones."

President Johnson announced a policy for federal agencies in June 1965 which required that the interception of telephone conversations without the consent of one of the parties be limited to investigations relating to national security and that the consent of the Attorney General be obtained in each instance. The memorandum went on to state that use of mechanical or electronic devices to overhear conversations not communicated by wire is an even more difficult problem "which raises substantial and unresolved questions of Constitutional interpretation." The memorandum instructed each agency conducting such an investigation to consult with the Attorney General to ascertain whether the agency's practices were fully in accord with the law. Subsequently, in September 1965, the Director of the FBI wrote the Attorney General and referred to the present atmosphere, brought about by the unrestrained and injudicious use of special investigative techniques by other agencies and departments, resulting in Congressional and public alarm and opposition to any activity which could in any way be termed an invasion of privacy." "As a consequence," the Director wrote, "we have discontinued completely the use of microphones." The Attorney General responded in part as follows: "The use of wiretaps and microphones involving trespass present more difficult problems because of the inadmissibility of any evidence obtained in court cases and because of current judicial and public attitude regarding their use. It is my understanding that such devices will not be used without my authorization, although in emergency circumstances they may be used subject to my later ratification. At this time I believe it desirable that all such techniques be confined to the gathering of intelligence in national security matters, and I will continue to approve all such requests in the future as I have in the past. I see no need to curtail any such activities in the national security field."

The policy of the Department was stated publicly by the Solicitor General in a supplement brief in the Supreme Court in *Black v. United States* in 1966. Speaking of the general delegation of authority by Attorneys General to the Director of the Bureau, the Solicitor General stated in his brief:

"An exception to the general delegation of authority has been prescribed, since 1940, for the interception of wire communications, which (in addition to being limited to matters involving national security or danger to human life) has required the specific authorization of the Attorney General in each instance. No similar procedure existed until 1965 with respect to the use of devices such as those involved in the instant case, although records of oral and written communications within the Department of Justice reflect concern by Attorneys General and the Director of the Federal Bureau of Investigation that the use of listening devices by agents of the government should be confined to a strictly limited category of situations. Under Departmental practice in effect for a period of years prior to 1963, and continuing until 1965, the Director of the Federal Bureau of Investigation was given authority to approve the installation of devices such as that in question for intelligence (and not evidentiary) purposes when required in the interests of internal security or national safety, including organized crime, kidnappings and matters wherein human life might be at stake.

Present Departmental practice, adopted in July 1965 in conformity with the policies declared by the President on June 30, 1965, for the entire federal establishment, prohibits the use of such listening devices (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is involved."

The Solicitor General made a similar statement in another brief filed that same term (*Schipani v. U.S.*) again emphasizing that the data would not be made available for prosecutorial purposes, and that the specific authorization of the Attorney General must be obtained in each instance when the national security is sought to be invoked. The number of telephone wiretaps and microphones installed since 1965 are as follows:

Telephone wiretaps:		Microphones:	
1965	233	1965	67
1966	174	1966	10
1967	113	1967	0
1968	82	1968	9
1969	123	1969	14
1970	102	1970	19
1971	101	1971	16
1972	108	1972	32
1973	123	1973	40
1974	190	1974	42

Comparable figures for the year 1975 up to October 29 are: Telephone wire-taps—121; Microphones—24.

In 1968 Congress passed the Omnibus Crime Control and Safe Streets Act. Title III of the Act set up a detailed procedure for the interception of wire or oral communications. The procedure requires the issuance of a judicial warrant, prescribes the information to be set forth in the petition to the judge so that, among other things, he may find probable cause that a crime has been or is about to be committed. It requires notification to the parties subject to the intended surveillance within a period not more than ninety days after the application for an order of approval has been denied or after the termination of the period of the order or the period of the extension of the order. Upon a showing of good cause the judge may postpone the notification. The Act contains a saving clause to the effect that it does not limit the constitutional power of the President to take such measures as he deems necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Then in a separate sentence the proviso goes on to say, "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the government."

The Act specifies the conditions under which information obtained through a presidentially authorized interception might be received into evidence. In speaking of this saving clause, Justice Powell in the *Keith* case in 1972 wrote: "Congress simply left presidential powers where it found them." In the *Keith* case the Supreme Court held that in the field of internal security, if there was no foreign involvement, a judicial warrant was required for the Fourth Amendment. Fifteen months after the *Keith* case Attorney General Richardson, in a letter to Senator Fulbright which was publicly released by the Department, stated: "In general, before I approve any new application for surveillance without a warrant, I must be convinced that it is necessary (1) to protect the nation against actual or potential attack or other hostile acts of a foreign power; (2) to obtain foreign intelligence information deemed essential to the security of the United States; or (3) to protect national security information against foreign intelligence activities."

I have read the debates and the reports of the Senate Judiciary Committee with respect to Title III and particularly the proviso. It may be relevant to point out that Senator Philip Hart questioned and opposed the form of the proviso reserving presidential power. But I believe it is fair to say that his concern was primarily, perhaps exclusively, with the language which dealt with presidential power to take such measures as the President deemed necessary to protect the United States "against any other clear and present danger to the structure or existence of the Government."

I now come to the Department of Justice's present position on electronic surveillance conducted without a warrant. Under the standards and procedures established by the President, the personal approval of the Attorney General is required before any non-consensual electronic surveillance may be instituted within the United States without a judicial warrant. All requests for surveillance must be made in writing by the Director of the Federal Bureau of Investigation and must set forth the relevant circumstances that justify the proposed surveillance. Both the agency and the Presidential appointee initiating the request must be identified. These requests come to the Attorney General after they have gone through review procedures within the Federal Bureau of Investigation. At my request, they are then reviewed in the Criminal Division of the Department. Before they come to the Attorney General, they are then examined by a special review group which I have established within the Office of the Attorney General. Each request, before authorization or denial, receives my personal attention. Requests are only authorized when the requested electronic surveillance is necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power; to obtain foreign intelligence deemed essential to the security of the nation; to protect national security information against foreign intelligence activities; or to obtain information certified as necessary for the conduct of foreign affairs matters important to the national security of the United States. In addition the subject of the electronic surveillance must be consciously assisting a foreign power or foreign-based political group, and there must be assurance that the minimum physical intrusion necessary to obtain the information sought will be used. As these criteria will show and as I will indicate at greater length later in discussing current guidelines the Depart-

ment of Justice follows, our concern is with respect to foreign powers or their agents. In a public statement made last July 9th, speaking of the warrantless surveillances then authorized by the Department, I said "it can be said that there are no outstanding instances of warrantless wiretaps or electronic surveillance directed against American citizens and none will be authorized by me except in cases where the target of surveillance is an agent or collaborator of a foreign power." This statement accurately reflects the situation today as well.

Having described in this fashion something of the history and conduct of the Department of Justice with respect to telephone wiretaps and microphone installations, I should like to remind the Committee of a point with which I began, namely, that the factual situations to be imagined for a discussion such as this are not only of a sensitive but a changing nature. I do not have much to say about this except to recall some of the language used by General Allen in his testimony before this Committee. The techniques of the NSA, he said, are of the most sensitive and fragile character. He described as the responsibility of the NSA the interception of international communication signals sent through the air. He said there had been a watch list, which among many other names, contained the names of U.S. citizens. Senator Tower spoke of an awesome technology—a huge vacuum cleaner of communications—which had the potential for abuses. General Allen pointed out that "The United States, as part of its effort to produce foreign intelligence, has intercepted foreign communications, analyzed, and in some cases decoded, these communications to produce such foreign intelligence since the Revolutionary War." He said the mission of NSA is directed to foreign intelligence obtained from foreign electrical communications and also from other foreign signals such as radar. Signals are intercepted by many techniques and processed, sorted and analyzed by procedures which reject inappropriate or unnecessary signals. He mentioned that the interception of communications, however it may occur, is conducted in such a manner as to minimize the unwanted messages. Nevertheless, according to his statement, many unwanted communications are potentially selected for further processing. He testified that subsequent processing, sorting and selection for analysis are conducted in accordance with strict procedures to insure immediate and, wherever possible, automatic rejection of inappropriate messages. The analysis and reporting is accomplished only for those messages which meet specific conditions and requirements for foreign intelligence. The use of lists of words, including individual names, subjects, locations, et cetera, has long been one of the methods used to sort out information of foreign intelligence value from that which is not of interest.

General Allen mentioned a very interesting statute, 18 USC 952, to which I should like to call your particular attention. The statute makes it a crime for any one who by virtue of his employment by the United States obtains any official diplomatic code and willfully publishes or furnishes to another without authorization any such code or any other matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States. I call this to your attention because a certain indirection is characteristic of the development of law, whether by statute or not, in this area.

The Committee will at once recognize that I have not attempted to summarize General Allen's testimony, but rather to recall it so that this extended dimension of the variety of fact situations which we have to think about as we explore the coverage and direction of the Fourth Amendment is at least suggested.

Having attempted to provide something of a factual base for our discussion, I turn now to the Fourth Amendment. Let me say at once, however, that while the Fourth Amendment can be a most important guide to values and procedures, it does not mandate automatic solutions.

The history of the Fourth Amendment is very much the history of the American Revolution and this nation's quest for independence. The Amendment is the legacy of our early years and reflects values most cherished by the Founders. In a direct sense, it was a reaction to the general warrants and writs of assistance employed by the officers of the British Crown to rummage and ransack colonists' homes as a means to enforce antismuggling and customs laws. General search warrants had been used for centuries in England against those accused of seditious libel and other offenses. These warrants, sometimes judicial, sometimes not, often general as to persons to be arrested, places to be searched, and things to be seized, were finally condemned by Lord Camden in 1765 in *Entick v. Carrington*, a decision later celebrated by the Supreme Court in *Boyd v. United States* as a "landmark of English liberty" \* \* \* one of the permanent monuments

of the British Constitution." The case involved a general warrant, issued by Lord Halifax as Secretary of State, authorizing messengers to search for John Entick and to seize his private papers and books. Entick had written publications criticizing the Crown and was a supporter of John Wilkes, the famous author and editor of the *North Briton* whose own publications had prompted wholesale arrests, searches, and seizures. Entick sued for trespass and obtained a jury verdict in his favor. In upholding the verdict, Lord Camden observed that if the government's power to break into and search homes were accepted, "the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."

The practice of the general warrants, however, continued to be known in the colonies. The writ of assistance, an even more arbitrary and oppressive instrument than the general warrant, was also widely used by revenue officers to detect smuggled goods. Unlike a general warrant, the writ of assistance was virtually unlimited in duration and did not have to be returned to the court upon its execution. It broadly authorized indiscriminate searches and seizures against any person suspected by a customs officer of possessing prohibited or uncustomed goods. The writs, sometimes judicial, sometimes not, were usually issued by colonial judges and vested Crown officers with unreviewed and unbounded discretion to break into homes, rifle drawers, and seize private papers. All officers and subjects of the Crown were further commanded to assist in the writ's execution. In 1761 James Otis eloquently denounced the writs as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book," since they put "the liberty of every man in the hands of every petty officer." Otis' fiery oration later prompted John Adams to reflect that "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

The words of the Fourth Amendment are mostly the product of James Madison. His original version appeared to be directed solely at the issuance of improper warrants.<sup>1</sup> Revisions accomplished under circumstances that are still unclear transformed the Amendment into two separate clauses. The change has influenced our understanding of the nature of the rights it protects. As embodied in our Constitution, the Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Our understanding of the purposes underlying the Fourth Amendment has been an evolving one. It has been shaped by subsequent historical events, by the changing conditions of our modern technological society, and by the development of our own traditions, customs, and values. From the beginning, of course, there has been agreement that the Amendment protects against practices such as those of the Crown officers under the notorious general warrants and writs of assistance. Above all, the Amendment safeguards the people from unlimited, undue infringement by the government on the security of persons and their property.

But our perceptions of the language and spirit of the Amendment have gone beyond the historical wrongs the Amendment was intended to prevent. The Supreme Court has served as the primary explicator of these evolving perceptions and has sought to articulate the values the Amendment incorporates. I believe it is useful in our present endeavor to identify some of these perceived values.

First, broadly considered, the Amendment speaks to the autonomy of the individual against society. It seeks to accord to each individual, albeit imperfectly, a measure of the confidentiality essential to the attainment of human dignity. It is a shield against indiscriminate exposure of an individual's private affairs to the world—an exposure which can destroy, since it places in jeopardy the spontaneity of thought and action on which so much depends. As Justice

<sup>1</sup> Madison's proposal read as follows: "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."

Brandeis observed in his dissent in the *Olmstead* case, in the Fourth Amendment the Founders "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Judge Jerome Frank made the same point in a dissent in a case in which a paid informer with a concealed microphone broadcast an intercepted conversation to a narcotics agent. Judge Frank wrote in *United States v. On Lee* that "[a] sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." The Amendment does not protect absolutely the privacy of an individual. The need for privacy, and the law's response to that need, go beyond the Amendment. But the recognition of the value of individual autonomy remains close to the Amendment's core.

A parallel value has been the Amendment's special concern with intrusions when the purpose is to obtain evidence to incriminate the victim of the search. As the Supreme Court observed in *Boyd*, which involved an attempt to compel the production of an individual's private papers, at some point the Fourth Amendment's prohibition against unreasonable searches and seizures and the Fifth Amendment's prohibition against compulsory self-incrimination, "run almost into each other." The intrusion on an individual's privacy has long been thought to be especially grave when the search is based on a desire to discover incriminating evidence.<sup>1</sup> The desire to incriminate may be seen as only an aggravating circumstance of the search, but it has at times proven to be a decisive factor in determining its legality. Indeed, in *Boyd* the Court declared broadly that "compelling the production of [a person's] private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government."

The incrimination evidence point goes to the integrity of the criminal justice system. It does not necessarily settle the issue whether the overhearing can properly take place. It goes to the use and purpose of the information overheard.

An additional concern of the Amendment has been the protection of freedom of thought, speech, and religion. The general warrants were used in England as a powerful instrument to suppress what was regarded as seditious libel or non-conformity. Wilkes was imprisoned in the Tower and all his private papers seized under such a warrant for his criticism of the King. As Justice Frankfurter inquired, dissenting in *Harris v. United States*, a case that concerned the permissible scope of searches incident to arrest, "How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar . . . ?" So Justice Power stated in *Keith* that "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs."

Another concern embodied in the Amendment may be found in its second clause dealing with the warrant requirement, even though the Fourth Amendment does not always require a warrant. The fear is that the law enforcement officer, if unchecked, may misuse his powers to harass those who hold unpopular or simply different views and to intrude capriciously upon the privacy of individuals. It is the recognition of the possibility for abuse, inherent whenever executive discretion is uncontrolled, that gives rise to the requirement of a warrant. That requirement constitutes an assurance that the judgment of a neutral and detached magistrate will come to bear before the intrusion is made and that the decision whether the privacy of the individual must yield to a greater need of society will not be left to the executive alone.

A final value reflected in the Fourth Amendment is revealed in its opening words: "The right of the people." Who are "the people" to whom the Amendment refers? The Constitution begins with the phrase, "We the People of the United States." That phrase has the character of words of art, denoting the power from which the Constitution comes. It does suggest a special concern for the American citizen and for those who share the responsibilities of citizens. The Fourth Amendment guards the right of "the people" and it can be urged that it was not meant to apply to foreign nations, their agents and collaborators. Its application may at least take account of that difference.

<sup>1</sup> The concern with self-incrimination is reflected in the test of standing to invoke the exclusionary rule. As the Court stated in *United States v. Calandra*: "Thus, standing to invoke the exclusionary rule [under the Fourth Amendment] has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. . . . This standing rule is premised on a recognition that the need for deterrence, and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."

The values outlined above have been embodied in the Amendment from the beginning. But the importance accorded a particular value has varied during the course of our history: Some have been thought more important or more threatened than others at times. When several of the values coalesce, the need for protection has been regarded as greatest. When only one is involved, that need has been regarded as lessened. Moreover, the scope of the Amendment itself has been altered over time, expanding or contracting in the fact of changing circumstances and needs. As with the evolution of other constitutional provisions, this development has been case in definitional terms. Words have been read by different Justices and different Courts to mean different things. The words of the Amendment have not changed; we, as a people, and the world which envelops us, have changed.

An important example is what the Amendment seeks to guard as "secure." The wording of the Fourth Amendment suggests a concern with tangible property. By its terms, the Amendment protects the right of the people to be secure in their "persons, houses, papers and effects." The emphasis appears to be on the material possessions of a person, rather than on his privacy generally. The Court came to that conclusion in 1928 in the *Olmstead* case, holding that the interception of telephone messages, if accomplished without a physical trespass, was outside the scope of the Fourth Amendment. Chief Justice Taft, writing for the Court, reasoned that wiretapping did not involve a search or seizure; the Amendment protected only tangible material "effects" and not intangibles such as oral conversations. A thread of the same idea can be found in *Bntick*, where Lord Camden said: "The great end for which men entered into society was to secure their property." But, while the removal and carrying off of papers was a trespass of the most aggravated sort, inspection alone was not: "the eye", Lord Camden said, "cannot by the law of England be guilty of a trespass."

The movement of the law since *Olmstead* has been steadily from protection of property to protection of privacy. In the *Goldman* case in 1942 the Court held that the use of a detectaphone placed against the wall of a room to overhear oral conversations in an adjoining office was not unlawful because no physical trespass was involved. The opinion's unstated assumption, however, appeared to be that a private oral conversation could be among the protected "effects" within the meaning of the Fourth Amendment. The *Silverman* case later eroded *Olmstead* substantially by holding that the Amendment was violated by the interception of an oral conversation through the use of a spike mike driven into a party wall, penetrating the heating duct of the adjacent home. The Court stated that the question whether a trespass had occurred as a technical matter of property law was not controlling; the existence of an actual intrusion was sufficient.

The Court finally reached the opposite emphasis from its previous stress on property in 1967 in *Katz v. United States*. The Court declared that the Fourth Amendment "protects people, not places," against unreasonable searches and seizures; that oral conversations, although intangible, were entitled to be secure against the uninvited ear of a government officer, and that the interception of a telephone conversation, even if accomplished without a trespass, violated the privacy on which petitioner justifiably relied while using a telephone booth. Justice Harlan, in a concurring opinion, explained that to have a constitutionally protected right of privacy under *Katz* it was necessary that a person, first, "have exhibited an actual (subjective) expectation of privacy and; second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

At first glance, *Katz* might be taken as a statement that the Fourth Amendment now protects all reasonable expectations of privacy—that the boundaries of the right of privacy are coterminous with those of the Fourth Amendment. But that assumption would be misleading. To begin with the Amendment still protects some interests that have very little if any thing to do with privacy. Thus, the police, may not, without warrant, seize an automobile parked on the owner's driveway even though they have reason to believe that the automobile was used in committing a crime. The interest protected by the Fourth Amendment in such a case is probably better defined in terms of property than privacy. Moreover, the *Katz* opinion itself cautioned that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' " Some privacy interests are protected by remaining Constitutional guarantees. Others are protected by federal statute, by the states, or not at all.

The point is twofold. First, under the Court's decisions, the Fourth Amendment does not protect every expectation of privacy, no matter how reasonable or actual that expectation may be. It does not protect, for example, against false friends' betrayals to the police of even the most private confidences. Second, the



"reasonable expectation of privacy" standard, often said to be the test of *Katz*, is itself a conclusion. It represents a judgment that certain behavior should, as a matter of law be protected against unrestrained governmental intrusion. That judgment, to be sure, rests in part on an assessment of the reasonableness of the expectation, that is, on an objective, factual estimation of a risk of intrusion under given circumstances, joined with an actual expectation of privacy by the person involved in a particular case. But it is plainly more than that, since it is also intermingled with a judgment as to how important it is to society that an expectation should be confirmed—a judgment based on a perception of our customs, traditions, and values as a free people.

The *Katz* decision itself illustrates the point. Was it really a "reasonable expectation" at the time of *Katz* for a person to believe that his telephone conversation in a public phone booth was private and not susceptible to interception by a microphone on the booth's outer wall? Almost forty years earlier in *Olmstead* the Court held that such nontrespassory interceptions were permissible. *Goldman* reaffirmed that holding. So how could *Katz* reasonably expect the contrary? The answer, I think, is that the Court's decision in *Katz* turned ultimately on an assessment of the effect of permitting such unrestrained intrusions on the individual in his private and social life. The judgment was that a license for unlimited governmental intrusions upon every telephone would pose too great a danger to the spontaneity of human thought and behavior. Justice Harlan put the point this way in *United States v. White*:

"The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."

A weighing of values is an inescapable part in the interpretation and growth of the Fourth Amendment. Expectations, and their reasonableness, vary according to circumstances. So will the need for an intrusion and its likely effect. These elements will define the boundaries of the interests which the Amendment holds as "secure."

To identify the interests which are to be "secure," of course, only begins the inquiry. It is equally essential to identify the dangers from which those interests are to be secure. What constitutes an intrusion will depend on the scope of the protected interest. The early view that the Fourth Amendment protected only tangible property resulted in the rule that a physical trespass or taking was the measure of an intrusion: *Olmstead* rested on the fact that there had been no physical trespass into the defendant's home or office. It also held that the use of the sense of hearing to intercept a conversation did not constitute a search or seizure. *Katz*, by expanding the scope of the protected interests, necessarily altered our misunderstanding of what constitutes an intrusion. Since intangibles such as oral conversations are now regarded as protected "effects," the over-hearing of a conversation may constitute an intrusion apart from whether a physical trespass is involved.

The nature of the search and seizure can be very important. An entry into a house to search its interior may be viewed as more serious than the over-hearing of a certain type of conversation. The risk of abuse may loom larger in one case than the other. The factors that have come to be viewed as most important, however, are the purpose and effect of the intrusion. The Supreme Court has tended to focus not so much on what was physically done, but on why it was done and what the consequence is likely to be. What is seized, why it was seized, and what is done with what is seized are critical questions. I stated earlier that a central concern of the Fourth Amendment was with intrusions to obtain evidence to incriminate the victim of the search. This concern has been reflected in Supreme Court decisions which have traditionally treated intrusions to gather incriminatory evidence differently from intrusions for neutral or benign purposes. In *Frank v. Maryland*, the appellant was fined for refusing to allow a housing inspector to enter his residence to determine whether it was maintained in compliance with the municipal housing code. Violation of the code would have led only to a direction to remove the violation. Only failure to comply with the direction would lead to a criminal sanction. The Court held that such administrative searches could be conducted without warrant. Justice Frankfurter, writing for the Court, noted that the Fourth Amendment was a reaction to "ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods." He observed that both *Entick* and *Boyd* were concerned with attempts to compel individuals to incriminate themselves in criminal cases and that "it was on the

issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought." There was thus a great difference, the Justice said, between searches to seize evidence for criminal prosecutions and searches to detect the existence of municipal health code violations. Searches in this latter category, conducted "as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, [have] antecedents deep in our history," and should not be subjected to the warrant requirement.

*Frank* was later overruled in 1967 in *Camara v. Municipal Court*, and a companion case, *See v. City of Seattle*. In *Camara*, appellant was, like *Frank*, charged with a criminal violation as a result of his refusal to permit a municipal inspector to enter his apartment to investigate possible violations of the city's housing code. The Supreme Court rejected the *Frank* rationale that municipal fire, health, and housing inspections could be conducted without a warrant because the object of the intrusion was not to search for the fruits or instrumentalities of crime. Moreover, the Court noted that most regulatory laws such as fire, health, and housing codes were enforced by criminal processes, that refusal to permit entry to an inspector was often a criminal offense, and that the "self-protection" or "non-incrimination" objective of the Fourth Amendment was therefore indeed involved.

But the doctrine of *Camara* proved to be limited. In 1971 in *Wyman v. James* the Court held that a "home visit" by a welfare caseworker, which entailed termination of benefits if the welfare recipient refused entry, was lawful despite the absence of a warrant. The Court relied on the importance of the public's interest in obtaining information about the recipient, the reasonableness of the measures taken to ensure that the intrusion was limited to the extent practicable, and most importantly, the fact that the primary objective of the search was not to obtain evidence for a criminal investigation or prosecution. *Camara* and *Frank* were distinguished as involving criminal proceedings.

Perhaps what these cases mainly say is that the purpose of the intrusion, and the use to which what is seized is put, are more important from a constitutional standpoint than the physical act of intrusion itself. Where the purpose or effect is noncriminal, the search and seizure is perceived as less troublesome and there is a readiness to find reasonableness even in the absence of a judicial warrant. By contrast, where the purpose of the intrusion is to gather incriminatory evidence, and hence hostile, or when the consequence of the intrusion is the sanction of the criminal law, greater protections may be given.

The Fourth Amendment then, as it has always been interpreted, does not give absolute protection against Government intrusion. In the words of the Amendment, the right guaranteed is security against *unreasonable* searches and seizures. As Justice White said in the *Camara* case, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Whether there has been a constitutionally prohibited invasion at all has come to depend less on an absolute dividing line between protected and unprotected areas, and more on an estimation of the individual security interests affected by the Government's actions. Those effects, in turn, may depend on the purpose for which the search is made; whether it is hostile, neutral, or benign in relation to the person whose interests are invaded; and also on the manner of the search.

By the same token, the Government's need to search, to invade individual privacy interests, is no longer measured exclusively—if indeed it ever was—by the traditional probable cause standard. The second clause of the Amendment states, in part, that "no warrants shall issue but upon probable cause." The concept of probable cause has often been read to bear upon and in many cases to control the question of the reasonableness of searches, whether with or without warrant. The traditional formulation of the standard, as "reasonable grounds for believing that the law was being violated on the premises to be searched" relates to the Governmental interest in the prevention of criminal offenses, and to seizure of their instruments and fruits (*Brinegar v. United States*). This formulation in *Gould v. United States* once took content from the long-standing "mere evidence rule"—that searches could not be undertaken "solely for the purpose of . . . [securing] evidence to be used . . . in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public . . . may have in the property to be seized." The Government's interest in the intrusion, like the individual's interest in privacy, thus was defined in terms of property, and the right to search as well as to seize was limited to items—contraband and the fruits and

instrumentalities of crime—in which the Government's interest was thought superior to the individual's. This notion, long eroded in practice, was expressly abandoned by the Court in 1967 in *Warden v. Hayden*. Thus, the detection of crime—the need to discover and use “mere evidence”—may presently justify intrusion.

Moreover, as I have indicated, the Court has held that, in certain situations, something less than probable cause—in the traditional sense—may be sufficient ground for intrusion, if the degree of intrusion is limited strictly to the purposes for which it is made. In *Terry v. Ohio* the Court held that a policeman, in order to protect himself and others nearby, may conduct a limited “pat down” search for weapons when he has reasonable grounds for believing that criminal conduct is taking place and that the person searched is armed and dangerous. Last term, in *United States v. Brignoni-Ponce*, the Court held that, if an officer has a “founded suspicion” that a car in a border area contains illegal aliens, the officer may stop the car and ask the occupants to explain suspicious circumstances. The Court concluded that the important Governmental interest involved, and the absence of practical alternatives, justified the minimal intrusion of a brief stop. In both *Terry* and *Brignoni*, the Court emphasized that a more drastic intrusion—a thorough search of the suspect or automobile—would require the justification of traditional probable cause. This point is reflected in the Court's decisions in *Almeida-Sanchez* and *Ortiz*, in which the Court held that, despite the interest in stemming illegal immigration, searches of automobiles either at fixed checkpoints or by roving patrols in places that are not the “functional equivalent” of borders could not be undertaken without probable cause.

Nonetheless, it is clear that the traditional probable cause standard is not the exclusive measure of the Government's interest. The kind and degree of interest required depend on the severity of the intrusion the Government seeks to make. The requirement of the probable cause standard itself may vary, as the Court made clear in *Camara*. That case, as you recall, concerned the nature of the probable cause requirement in the context of searches to identify housing code violations. The Court was persuaded that the only workable method of enforcement was periodic inspection of all structures, and concluded that because the search was not “personal in nature,” and the invasion of privacy involved was limited, probable cause could be based on “appraisal of conditions in the area as a whole,” rather than knowledge of the condition of particular buildings. “If a valid public interest justifies the intrusion contemplated,” the court stated, “then there is probable cause to issue a suitable restricted search warrant.” In the *Keith* case, while holding that domestic national security surveillance—not involving the activities of foreign powers and their agents—was subject to the warrant requirement, the Court noted that the reasons for such domestic surveillance may differ from those justifying surveillances for ordinary crimes, and that domestic security surveillances often have to be long range projects. For these reasons, a standard of probable cause to obtain a warrant different from the traditional standard would be justified: “Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.

In brief, although at one time the “reasonableness” of a search may have been defined according to the traditional probable cause standard, the situation has now been reversed. Probable cause has come to depend on reasonableness—on the legitimate need of the Government and whether there is reason to believe that the precise intrusion sought, measured in terms of its effect on individual security, is necessary to satisfy it.

This point is critical in evaluating the reasonableness of searches or surveillances undertaken to protect national security. In some instances, the Government's interest may be, in part, to protect the nation against specific actions of foreign powers or their agents—actions that are criminal offenses. In other instances, the interest may be to protect against the possibility of actions by foreign powers and their agents dangerous to national security—actions that may or may not be criminal. Or the interest may be solely to gather intelligence, in a variety of forms, in the hands of foreign agents and foreign powers—intelligence that may be essential to informed conduct of our nation's foreign affairs. This last interest indeed may often be far more critical for the protection of the nation than the detection of a particular criminal offense. The Fourth Amendment's standard of reasonableness as it has developed in the Court's decisions is sufficiently flexible to recognize this.

Just as the reasonableness standard of the Amendment's first clause has taken content from the probable cause standard, so it has also come to incorporate the particularity requirement of the warrant clause—that warrants particularly describe “the place to be searched, and the persons or things to be seized.” As one Circuit Court has written, in *United States v. Poller*, although pointing out the remedy might not be very extensive, “[L]imitations on the fruit to be gathered tend to limit the quest itself.”

The Government's interest and purpose in undertaking the search defines its scope, and the societal importance of that purpose can be weighed against the effects of the intrusion on the individual. By precise definition of the objects of the search, the degree of intrusion can be minimized to that reasonably necessary to achieve the legitimate purpose. In this sense, the particularity requirement of the warrant clause is analogous to the minimization requirement of Title III, that interceptions “be executed in such a way to minimize the interception of communications not otherwise subject to interception” under the Title.

But there is a distinct aspect to the particularity requirements—one that is often overlooked. An officer who has obtained a warrant based upon probable cause to search for particular items may in conducting the search necessarily have to examine other items, some of which may constitute evidence of an entirely distinct crime. The normal rule under the plain view doctrine is that the officer may seize the latter incriminating items as well as those specifically identified in the warrant so long as the scope of the authorized search is not exceeded. The minimization rule responds to the concern about overly broad searches, and it requires an effort to limit what can be seized. It also may be an attempt to limit how it can be used. Indeed, this minimization concern may have been the original purpose of the “mere evidence” rule.

The concern about the use of what is seized may be most important for future actions. Until very recently—in fact, until the Court's 1971 decision in *Biven v. Six Unknown Federal Narcotic Agents*—the only sanction against an illegal search was that its fruits were inadmissible at any criminal trial of the person whose interest was invaded. So long as this was the only sanction, the courts, in judging reasonableness, did not really have to weigh any governmental interest other than that of detecting crimes. In practical effect, a search could only be “unreasonable” as a matter of law if an attempt was made to use its fruits for prosecution of a criminal offense. So long as the Government did not attempt such use, the search could continue and the Government's interests, other than enforcing criminal laws, could be satisfied.

It may be said that this confuses rights and remedies; searches could be unreasonable even though no sanction followed. But I am not clear that this is theoretically so, and realistically it was not so. As I have noted earlier, the reasonableness of a search has depended, in major part, on the purpose for, which it is undertaken and on whether that purpose, in relation to the person whom it affects, is hostile or benign. The search most hostile to an individual is one in preparation for his criminal prosecution. Exclusion of evidence from criminal trials may help assure that searches undertaken for ostensibly benign motives are not used as blinds for attempts to find criminal evidence, while permitting searches that are genuinely benign to continue. But there is a more general point. The effect of a Government intrusion on individual security is a function, not only of the intrusion's nature and circumstances, but also of disclosure and of the use to which its product is put. Its effects are perhaps greatest when it is employed or can be employed to impose criminal sanctions or to deter, by disclosure, the exercise of individual freedoms. In short, the use of the product seized bears upon the reasonableness of the search.

These observations have particular bearing on electronic surveillance. By the nature of the technology the “search” may necessarily be far broader than its legitimate objects. For example, a surveillance justified as the only means of obtaining value foreign intelligence may require the temporary overhearing of conversations containing no foreign intelligence whatever in order eventually to locate its object. To the extent that we can, by purely mechanical means, select out only that information that fits the purpose of the search, the intrusion is radically reduced. Indeed, in terms of effects on individual security, there would be no intrusion at all. But other steps may be appropriate. In this respect, I think we should recall the language and the practice for many years under former § 605 of the Communications Act. The Act was violated, not by surveillance alone, but only by surveillance and disclosure in court or to the public. It may be that if a critical Governmental purpose justifies a surveillance, but because of technological

limitations it is not possible to limit surveillance strictly to those persons as to whom alone surveillance is justified, one way of reducing the intrusion's effects is to limit strictly the revelation or disclosure or the use of its product. Minimization procedures can be very important.

In discussing the standard of reasonableness. I have necessarily described the evolving standards for issuing warrants and the standards governing their scope. But I have not yet discussed the warrant requirement itself—how it relates to the reasonableness standard and what purposes it was intended to serve. The relationship of the warrant requirement to the reasonableness standard was described in *Johnson v. United States* by Justice Robert Jackson: "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the rights of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. This view has not always been accepted by a majority of the Court; the Court's view of the relationship between the general reasonableness standard and the warrant requirement has shifted often and dramatically. But the view expressed by Justice Jackson is now quite clearly the prevailing position. The Court said in *Katz* that "searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Such exceptions include those grounded in necessity—where exigencies of time and circumstance make resort to a magistrate practically impossible. These include, of course, the *Terry* stop and frisk and, to some degree, searches incident to arrest. But there are other exceptions, not always grounded in exigency—for example, some automobile searches—and at least some kinds of searches not conducted for purposes of enforcing criminal laws—such as the welfare visits of *Wyman v. James*. In short, the warrant requirement itself depends on the purpose and degree of intrusion. A footnote to the majority opinion in *Katz*, as well as Justice White's concurring opinion, left open the possibility that warrants may not be required for searches undertaken for national security purposes. And, of course, Justice Powell's opinion in *Keith*, while requiring warrants for domestic security surveillances, suggests that a different balance may be struck when the surveillance is undertaken against foreign powers and their agents to gather intelligence information or to protect against foreign threats.

The purpose of the warrant requirement is to guard against over-zealousness of Government officials, who may tend to overestimate the basis and necessity of intrusion and to underestimate the impact of their efforts on individuals. It was said in *United States v. United States District Court*: "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." These purposes of the warrant requirement must be kept firmly in mind in analyzing the appropriateness of applying it to the foreign intelligence and security area.

There is a real possibility that application of the warrant requirement, at least in the form of the normal criminal search warrant, the form adopted in Title III, will endanger legitimate Government interests. As I have indicated, Title III sets up a detailed procedure for interception of wire or oral communications. It requires the procurement of a judicial warrant and prescribes the information to be set forth in the petition to the judge so that, among other things, he may find probable cause that a crime has been or is about to be committed. It requires notification to the parties subject to the surveillance within a period after it has taken place. The statute is clearly unsuited to protection of the vital national interests in continuing detection of the activities of foreign powers and their agents. A notice requirement—aside from other possible repercussions—could destroy the usefulness of intelligence source and methods. The most critical surveillance in this area may have nothing whatever to do with detection of crime.

Apart from the problems presented by particular provisions of Title III, the argument against application of the warrant requirement, even with an expanded probable cause standard, is that judges and magistrates may underestimate the importance of the Government's need, or that the information necessary to make that determination cannot be disclosed to a judge or magistrate without risk of its accidental revelation—a revelation that could work great harm to the nation's security. What is often less likely to be noted is that a magistrate

may be as prone to overestimate as to underestimate the force of the Government's need. Warrants necessarily are issued *ex parte*; often decision must come quickly on the basis of information that must remain confidential. Applications to any one judge or magistrate would be only sporadic; no opinion could be published: this would limit the growth of judicially developed, reasonably uniform standards based, in part, on the quality of the information sought and the knowledge of possible alternatives. Equally important, responsibility for the intrusion would have been diffused. It is possible that the actual number of searches or surveillances would increase if executive officials, rather than bearing responsibility themselves, can find shield behind a magistrate's judgment of reasonableness. On the other hand, whatever the practical effect of a warrant requirement may be, it would still serve the important purpose of assuring the public that searches are not conducted without the approval of a neutral magistrate who could prevent abuses of the technique.

In discussing the advisability of a warrant requirement, it may also be useful to distinguish among possible situations that arise in the national security area. Three situations—greatly simplified—come to mind. They differ from one another in the extent to which they are limited in time or in target. First, the search may be directed at a particular foreign agent to detect a specific anticipated activity—such as the purchase of a secret document. The activity which is to be detected ordinarily would constitute a crime. Second, the search may be more extended in time—even virtually continuous—but still would be directed at an identified foreign agent. The purpose of such a surveillance would be to monitor the agent's activities, determine the identities of persons whose access to classified information he might be exploiting, and determine the identity of other foreign agents with whom he may be in contact. Such a surveillance might also gather foreign intelligence information about the agent's own country, information that would be of positive intelligence value to the United States. Third, there may be virtually continuous surveillance which by its nature does not have specifically predetermined targets. Such a surveillance could be designed to gather foreign intelligence information essential to the security of the nation.

The more limited in time and target a surveillance is, the more nearly analogous it appears to be with a traditional criminal search which involves a particular target location or individual at a specific time. Thus, the first situation I just described would in that respect be most amenable to some sort of warrant requirement, the second less so. The efficiency of a warrant requirement in the third situation would be minimal. If the third type of surveillance I described were submitted to prior judicial approval, that judicial decision would take the form of *ex parte* declaration that the program of surveillance designed by the Government strikes a reasonable balance between the government's need for the information and the protection of individuals' rights. Nevertheless, it may be that different kinds of warrants could be developed to cover the third situation. In his opinion in *Almeida-Sanchez*, Justice Powell suggested the possibility of area warrants—issued on the basis of the conditions in the area to be surveilled—to allow automobile searches in areas near America's borders. The law has not lost its inventiveness, and it might be possible to fashion new judicial approaches to the novel situations that come up in the area of foreign intelligence. I think it must be pointed out that for the development of such an extended, new kind of warrant, a statutory base might be required or at least appropriate. At the same time, in dealing with this area, it may be mistaken to focus on the warrant requirement alone to the exclusion of other, possibly more realistic, protections.

What, then, is the shape of the present law? To begin with, several statutes appear to recognize that the Government does intercept certain messages for foreign intelligence purpose and that this activity must be, and can be, carried out. Section 952 of Title 18, which I mentioned earlier is one example; section 798 of the same title is another. In addition, Title III's proviso, which I have quoted earlier, explicitly disclaimed any intent to limit the authority of the Executive to conduct electronic surveillance for national security and foreign intelligence purposes. In an apparent recognition that the power would be exercised, Title III specifies the conditions under which information obtained through Presidentially authorized surveillance may be received into evidence. It seems clear, therefore, that in 1968 Congress was not prepared to come to a judgment that the Executive should discontinue its activities in this area, nor was it prepared to regulate how those activities were to be conducted. Yet it cannot be said that Congress has been entirely silent on this matter. Its express statutory references to the existence of the activity must be taken into account.

The case law, although unsatisfactory in some respects, has supported or left untouched the policy of the Executive in the foreign intelligence area whenever the issue has been squarely confronted. The Supreme Court's decision in the *Keith* case in 1972 concerned the legality of warrantless surveillance directed against a domestic organization with no connection to a foreign power and the Government's attempt to introduce the product of the surveillance as evidence in the criminal trial of a person charged with bombing a C.I.A. office in Ann Arbor, Michigan. In part because of the danger that uncontrolled discretion might result in use of electronic surveillance to deter domestic organizations from exercising First Amendment rights, the Supreme Court held that in cases of internal security, when there is no foreign involvement, a judicial warrant is required. Speaking for the Court, Justice Powell emphasized that "this case involves only the domestic aspects of national security". We have expressed no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents.

As I observed in my remarks at the ABA convention, the Supreme Court surely realized, "in view of the importance the Government has placed on the need for warrantless electronic surveillance that, after the holding in *Keith*, the Government would proceed with the procedures it had developed to conduct those surveillances not prohibited—that is, in the foreign intelligence area or, as Justice Powell said, 'with respect to activities of foreign powers and their agents.'"

The two federal circuit court decisions after *Keith* that have expressly addressed the problem have both held that the Fourth Amendment does not require a warrant for electronic surveillance instituted to obtain foreign intelligence. In the first, *United States v. Brown* the defendant, an American citizen, was incidentally overheard as the result of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes. In upholding the legality of the surveillance, the Court of Appeals for the Fifth Circuit declared that on the basis of, "the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign affairs . . . the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence." The court added that "(r)estrictions on the President's power which are appropriate in cases of domestic security become inappropriate in the context of the international sphere."

In *United States v. Butenko* the Third Circuit reached the same conclusion—that the warrant requirement of the Fourth Amendment does not apply to electronic surveillance undertaken for foreign intelligence purposes. Although the surveillance in that case was directed at a foreign agent, the court held broadly that the warrantless surveillance would be lawful so long as the primary purpose was to obtain foreign intelligence information. The court stated that such surveillance would be reasonable without a warrant even though it might involve the overhearing of conversations of "alien officials and agents, and perhaps of American citizens." I should note that although the United States prevailed in the *Butenko* case, the Department acquiesced in the petitioner's application for *certiorari* in order to obtain the Supreme Court's ruling on the question. The Supreme Court denied review, however, and thus left the Third Circuit's decision undisturbed as the prevailing law.

Most recently, in *Zweibon v. Mitchell*, decided in June of this year, the District of Columbia Circuit dealt with warrantless electronic surveillance directed against a domestic organization allegedly engaged in activities affecting this country's relations with a foreign power. Judge Skelly Wright's opinion for four of the nine judges makes many statements questioning any national security exception to the warrant requirement. The court's actual holding made clear in Judge Wright's opinion was far narrower and, in fact, is consistent with holdings in *Brown* and *Butenko*. The court held only that "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power." This holding, I should add, was fully consistent with the Department of Justice's policy prior to the time of the *Zweibon* decision.

With these cases in mind, it is fair to say electronic surveillance conducted for foreign intelligence purposes, essential to the national security, is lawful under the Fourth Amendment, even in the absence of a warrant, at least where the subject of the surveillance is a foreign power or an agent or collaborator of a foreign power. Moreover, the opinions of two circuit courts stress the purpose for which the surveillance is undertaken, rather than the identity of the subject. This suggests that in their view such surveillance without a warrant is lawful so long as its purpose is to obtain foreign intelligence.

But the legality of the activity does not remove from the Executive or from Congress the responsibility to take steps, within their power, to seek an accommodation between the vital public and private interests involved. In our effort to seek such an accommodation, the Department has adopted standards and procedures designed to ensure the reasonableness under the Fourth Amendment of electronic surveillance and to minimize to the extent practical the intrusion on individual interests. As I have stated, it is the Department's policy to authorize electronic surveillance for foreign intelligence purposes only when the subject is a foreign power or an agent of a foreign power. By the term "agent" I mean a conscious agent; the agency must be of a special kind and must relate to activities of great concern to the United States for foreign intelligence or counter intelligence reasons. In addition, at present, there is no warrantless electronic surveillance directed against any American citizen, and although it is conceivable that circumstances justifying such surveillance may arise in the future. I will not authorize the surveillance unless it is clear that the American citizen is an active, conscious agent or collaborator of a foreign power. In no event, of course, would I authorize any warrantless surveillance against domestic persons or organizations such as those involved in the *Keith* case. Surveillance without a warrant will not be conducted for purposes of security against domestic or internal threats. It is our policy, moreover, to use the Title III procedure whenever it is possible and appropriate to do so, although the statutory provisions regarding probable cause, notification, and prosecutive purpose make it unworkable in all foreign intelligence and many counterintelligence cases.

The standards and procedures that the Department has established within the United States seek to ensure that every request for surveillance receives thorough and impartial consideration before a decision is made whether to institute it. The process is elaborate and time-consuming, but it is necessary if the public interest is to be served and individual rights safeguarded.

I have just been speaking about telephone wiretapping and microphone surveillances which are reviewed by the Attorney General. In the course of its investigation, the committee has become familiar with the more technologically sophisticated and complex electronic surveillance activities of other agencies. These surveillance activities present somewhat different legal questions. The communications conceivably might take place entirely outside the United States. That fact alone, of course, would not automatically remove the agencies' activities from scrutiny under the Fourth Amendment since at times even communications abroad may involve a legitimate privacy interest of American citizens. Other communications conceivably might be exclusively between foreign powers and their agents and involve no American terminal. In such a case, even though American citizens may be discussed, this may raise less significant, or perhaps no significant, questions under the Fourth Amendment. But the primary concern, I suppose, is whether reasonable minimization procedures are employed with respect to use and dissemination.

With respect to all electronic surveillance, whether conducted within the United States or abroad, it is essential that efforts be made to minimize as much as possible the extent of the intrusion. Much in this regard can be done by modern technology. Standards and procedures can be developed and effectively deployed to limit the scope of the intrusion and the use to which its product is put. Various mechanisms can provide a needed assurance to the American people that the activity is undertaken for legitimate foreign intelligence purposes, and not for political or other improper purposes. The procedures used should not be ones which by indirection in fact target American citizens and resident aliens where these individuals would not themselves be appropriate targets. The proper minimization criteria can limit the activity to its justifiable and necessary scope.

Another factor must be recognized. It is the importance or potential importance of the information to be secured. The activity may be undertaken to obtain information deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.

Need is itself a matter of degree. It may be that the importance of some information is slight, but that may be impossible to gauge in advance; the significance of a single bit of information may become apparent only when joined to intelligence from other sources. In short, it is necessary to deal in probabilities. The importance of information gathered from foreign establishments and agents may be regarded generally as high—although even here there may be wide variations. At the same time, the effect on individual liberty and security—at



least of American citizens—caused by methods directed exclusively to foreign agents, particularly with minimization procedures, would be very slight.

There may be regulatory and institutional devices other than the warrant requirement that would better assure that intrusions for national security and foreign intelligence purposes reasonably balance the important needs of Government and of individual interests. In assessing possible approaches to this problem it may be useful to examine the practices of other Western democracies. For example, England, Canada, and West Germany each share our concern about the confidentiality of communications within their borders. Yet each recognizes the right of the Executive to intercept communications without a judicial warrant in cases involving suspected espionage, subversion or other national security intelligence matters.

In Canada and West Germany, which have statutes analogous to Title III, the Executive in national security cases is exempt by statute from the requirement that judicial warrants be obtained to authorize surveillance of communications. In England, where judicial warrants are not required to authorize surveillance of communications in criminal investigations, the relevant statutes recognize an inherent authority in the Executive to authorize such surveillance in national security cases.<sup>1</sup> In each country, this authority is deemed to cover interception of mail and telegrams, as well as telephone conversations.

In all three countries, requests for national security surveillance may be made by the nation's intelligence agencies. In each, a Cabinet member is authorized to grant the request.

In England and West Germany, however, interception of communications is intended to be a last resort, used only when the information being sought is likely to be unobtainable by any other means. It is interesting to note, however, that both Canada and West Germany do require the Executive to report periodically to the Legislature on its national security surveillance activities. In Canada, the Solicitor General files an annual report with the Parliament setting forth the number of national security surveillances initiated, their average length, a general description of the methods of interception or seizure used, and assessment of their utility.

It may be that we can draw on these practices of other Western democracies, with appropriate adjustments to fit our system of separation of powers. The procedures and standards that should govern the use of electronic methods of obtaining foreign intelligence and of guarding against foreign threats are matters of public policy and values. They are of critical concern to the Executive Branch and to Congress, as well as to the courts. The Fourth Amendment itself is a reflection of public policy and values—an evolving accommodation between governmental needs and the necessity of protecting individual security and rights. General public understanding of these problems is of paramount importance, to assure that neither the Executive, nor the Congress, nor the courts risk discounting the vital interests on both sides.

The problems are not simple. Evolving solutions probably will and should come—as they have in the past—from a combination of legislation, court decisions, and executive actions. The law in this area, as Lord Devlin once described the law of search in England, “is haphazard and ill defined.” It recognized the existence and the necessity of the Executive's power. But the Executive and the Legislature are, as Lord Devlin also said, “expected to act reasonably.” The future course of the law will depend on whether we can meet that obligation.

Senator MATHIAS. Well, the Chairman has asked how you could improve this legislation, and I have a very simple answer for you on that. On May 2, 1974, I introduced in the 93d Congress the Bill of Rights Procedures Act, which was designed to enforce the protections of the Bill of Rights by requiring a court order for many forms of Government surveillance, including mail opening, entry of homes, inspection of bank, credit, and medical records, as well as the use of bugs and wiretaps. And I guess the quickest answer that I could give you to improve it would be to substitute S. 3440 for the current bill. I think it would be an improvement.

<sup>1</sup> Report of the Committee on Privy Councillors appointed to inquire into the interception of communications (1957), which states, at page 5, that, “The origin of the power to intercept communications can only be surmised, but the power has been exercised from very early times; and has been recognised as a lawful power by a succession of statutes covering the last 200 years or more.”

But my problem is I am afraid it wouldn't be law in 1976, and I think we need law in 1976, and I would encourage the Committee to enact the present bill and go forward. Now, as a fallback position, on June 5, 1975, I again introduced the Bill of Rights Procedures Act, and I made some remarks on that occasion which again I would ask the chairman's permission to include as a part of this testimony.

Senator BAYH. Without objection.

[The document referred to follows:]

STATEMENT OF HON. CHARLES MCC. MATHIAS, JR., ON THE FLOOR OF THE SENATE  
JUNE 5, 1975

Mr. MATHIAS. Mr. President, recent events have demonstrated to all Americans that our Government has at times transcended constitutional processes and involved itself in a variety of excesses in the area of surveillance. These include, but are by no means limited to: military intelligence activities at the 1968 Democratic National Convention, FBI surveillance of various civil rights leaders and of participants at the 1964 Democratic Convention, wiretapping by the White House "plumbers" unit, compilation of thousands of files at the CIA related to domestic security, and the maintenance of FBI files on Members of Congress. Most startling of all is the so-called Huston plan revealed in the course of the Senate Watergate investigations.

Governmental surveillance—the Federal invasion into areas of privacy reasonably expected by all citizens—has sown the seeds of a deep-seated malaise into American life. Watergate, CIA and FBI surveillance, the maintenance of files on congressional Members all are part of this problem. They have been accompanied by an onrush of technological advancement and growing powers of bureaucratic structures, all of which has created a kind of "future shock" sense that things are just moving too fast—have gotten beyond our control.

The malaise gripping an ever-increasing number of Americans in the apprehension and fear that those who register dissent, those who voice displeasure with governmental policy, are subject to unbridled scrutiny through pervasive governmental surveillance techniques. Actual surveillance in blatant disregard of constitutional safeguards has created the apprehension that there may be intrusions at any time upon one of our most cherished ideals, the right to privacy. But perhaps of greater consequence is the chilling effect that accompanies such surveillance. The mere threat of monitoring intimidates individuals, forces withdrawal from political activity, and impinges upon first amendment freedoms. It is by no means an overstatement to claim that unchecked governmental surveillance strikes at the very vitality of this Nation.

The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Justice Brandeis emphasized the importance of the fourth amendment to the right of privacy in his 1928 Olmstead dissent:

To protect (the right to be let alone), every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment.

The Supreme Court in *Katz v. U.S.* 389 U.S. 347 (1967) held that the amendment's spirit now shields private speech from unreasonable surveillance. The decision implicitly recognizes that broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitates the application of the fourth amendment safeguards.

While the fourth amendment speaks of "unreasonable searches and seizures," reasonableness has been determined on the basis of the commands of the warrant clause:

It is not an inconvenience to be weighed somehow against the claims of policy efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a part of any system of law enforcement. *Coolidge v. New Hampshire*, 403 U.S. at 481.

More recently the High Court stated in *U.S. v. U.S. District Court*, 403 U.S. 297 (1972):

The fourth amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.

There are exceptions to the warrant requirement, but they are few and have been judicially delineated with extreme caution. The court in U.S. district court, supra., rejected the contention that there should be an exception to the warrant requirement in areas of domestic security; the inherent vagueness of the security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to use such surveillance to oversee political dissent dictate that the requisites of the fourth amendment be adhered to even in such matters. And the court called upon the Congress to formulate the standards upon which judicial approval of national security surveillance may be rendered. That is what this legislation is designed to provide.

Mr. President, keeping in mind:

The paramount interest we all share in our rights to privacy;

The frightening revelations of the past 2 years;

The chilling effect that unchecked governmental surveillance necessarily breeds; and

Congress' constitutional responsibility to enact statutory guidelines to assure that the Bill of Rights remains secure from the assaults of arbitrary power;

I reintroduce today a bill which would strengthen the guarantees of privacy contained in the fourth amendment. I introduced an identical bill in the 93d Congress, S. 3440. The bill, entitled "The Bill of Rights Procedure Act of 1975," would require any Federal agent to obtain a court order before he or she may conduct any form of surveillance on a private citizen. Probable cause must be demonstrated before the court order could issue and the warrant must be specific in its particulars.

The term surveillance includes bugging, wiretapping, and all other forms of electronic eavesdropping, opening of mail, entering of dwellings, and the inspection or procurement of the records of telephone, bank, credit, medical, or other private transactions. A court order would be required in virtually every instance, the only exceptions being: The serving of an arrest warrant, the hot pursuit of a criminal, or when the consent of the individual has been obtained.

A penalty of up to \$10,000 and/or a year imprisonment is provided for any governmental official, employee, or agent who willfully violates or causes the violation of the bill. The legislation requires that within 30 days after application for a court order, the applicant must file a report with the Administrative Office of the U.S. Courts and with the Committee on the Judiciary of the House and Senate. Followup reports on approved surveillance activities would also be required.

It is my firm belief that the discretionary authority in the area of governmental surveillance should not be lodged solely with the executive branch. Surveillance undertaken on any grounds including national security and foreign policy must conform with the requisites of constitutional processes.

The chief judge of the third circuit expressed his belief that there is no executive prerogative in the field of foreign affairs intelligence which may be beyond the reach of those checks and balances which in one way or another limits every other power of the central Government.

It is troubled times such as these that we are now facing that generates warnings and calls for action on the part of Congress. Congress has the responsibility and the power to enact the statutory guidelines necessary to assure that the Bill of Rights citadel constructed by our forefathers is not breached by the exercise of arbitrary power.

The substance of the Bill of Rights reflected the experience of the constitutional framers with governmental excesses; the legislation I introduce today reflects our recent experiences with executive excesses as well.

We have had clear and unmistakable warnings:

There must be provisions for vigorous oversight and full accountability of the activities of the U.S. Government in all areas of surveillance of American citizens; and

We must adhere to the belief upon which our form of government was founded. Law, freedom, the pursuit of justice, and the exercise of arbitrary and unchecked power are necessary, irreconcilable and in eternal conflict.

Mr. President, I am pleased to note today that a companion bill has been introduced in the House of Representatives by the Honorable Charles Mosher of Ohio. That bill has 72 cosponsors and has been the subject of hearings before the

Judiciary Committee of the House. This legislation has broad support and I am hopeful that it will receive prompt attention in the other body.

Mr. President, in the course of its deliberations, the House Judiciary Committee has indicated that it may make some changes in their bill. I am certainly amenable to any improvements. If, for instance, more specific standards for the issuance of subpoenas were to be provided, I would think we would want to give careful consideration. My point is that I am wedded to the concept of this legislation, but not to specific language.

Mr. President, I ask unanimous consent that the text of my bill be printed at this point in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1888

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bill of Rights Procedures Act of 1975".*

#### FINDINGS AND PURPOSES

SEC. 2. (a) The Congress hereby finds and declares that—

(1) the rights of the people of the United States under the Constitution of the United States are endangered by interception of communications, other electronic surveillance, the entry of dwellings, opening mail, and the inspection of and procuring of the records of telephone, bank, credit, medical or other business or private transactions of any individual when undertaken by officials, agents, or employees of the United States without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

(2) the constitutional duty of the Congress to make the laws and to provide for the common defense, and the constitutional duty of the President to execute the laws and to command the Armed Forces and other security forces according to rules and regulations made by the Congress, would not be impeded by requiring court orders for any interception of communications, other electronic surveillance, the entry of dwellings, opening mail, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual;

(3) the constitutional duty of the Congress to make laws to protect the national security of the United States and the constitutional duty of the President to execute such laws should not limit the rights of individuals under the Constitution of the United States. Any interception of communications, other than electronic surveillance, the entry of dwellings, opening mail, or the inspection of and procuring of the records of telephone, bank, credit, medical, or other business or private transactions of any individual which is undertaken on any grounds, including but not limited to, national security or foreign policy, without a court order issued upon probable cause that a crime has been or is about to be committed, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized, constitutes "an unreasonable search and seizure" within the meaning of the fourth amendment to the Constitution of the United States.

(b) It is therefore the purpose of this Act to prohibit any interception of communications, other electronic surveillance, surreptitious entry, mail opening, or the inspection of and procuring of the record of telephone, bank, credit, medical or other business or private transaction of any individual without a court order issued upon probable cause that a crime has been or is about to be committed supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

#### SEARCHES AND SEIZURES

SEC. 3. Section 2236 of title 18, United States Code, is amended to read as follows:

"§ 2236. Searches without warrant

"(a) Whoever, being an officer, agent, or employee of the United States or any department or agency thereof willfully—

"(1) searches any private dwelling used and occupied as a dwelling without a warrant directing such search or maliciously and without reasonable cause searches any other building or property with a search warrant;

"(2) procures or inspects the records of telephone calls bank, credit, medical or other business or private transactions of any individual without a search warrant or the consent of the individual;

"(3) opens any foreign or domestic mail not directed to him without a search warrant directing such opening or without the consent of the sender or addressee of such mail in violation of section 3623(d) of title 39; or

"(4) intercepts, endeavors to intercept, procures any other person to intercept any wire or oral communication except as authorized under chapter 119, shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

"(b) (1) The provisions of section (a) (1) shall not apply to any person—

"(A) serving a warrant of arrest;

"(B) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

"(C) making a search at the request or invitation or with the consent of the occupant of the premises.

"(2) For purposes of subsection (a) the terms 'wire communication', 'oral communication', and 'intercept' shall have the same meaning as given to such terms under chapter 119."

#### INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS

SEC. 4. (a) Section 2511(1) of such title 18 is amended by striking out "Except as otherwise specifically provided in this chapter" and inserting in lieu thereof "Except as specifically provided in this chapter, and except as specifically provided in chapter 109 in the case of any officer, agent or employee of the United States,"

(b) Sections 2511(3), 2518(7), 2518(d), and the last sentence of section 2520 of such title 18 are repealed.

#### REPORTING OF INTERCEPTED COMMUNICATIONS

SEC. 5. (a) Section 2519 of such title 18 is amended to read as follows:

"§2519. Reports concerning intercepted wire, oral, and other communications

"(a) Within thirty days after the date of an order authorizing or approving the interception of a wire or oral communication (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the person seeking such order shall report to the Administrative Office of the United States Courts and to the Committees on the Judiciary of the Senate and House of Representatives—

"(1) the fact that an order or extension was applied for;

"(2) the kind of order or extension applied for;

"(3) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(4) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(5) the names of all parties to the intercepted communications;

"(6) the offense specified in the order or application, or extension of an order;

"(7) the identity of the investigative or law enforcement officer and agency making the application and the person authorizing the application to be made;

"(8) a copy of the court order authorizing, approving, or denying such interception;

"(9) the nature of the facilities from which, or the place where communications were intercepted.

"(b) Within 60 days after the date of an order authorizing or approving the interception of a wire or oral communication (or extension thereof) entered under section 2518, or the denial of an order approving an interception, the judge hearing the application for such order shall transmit to the Committees on the Judiciary of the Senate and House of Representatives a complete transcript of the proceedings.

"(c) Within 90 days after the date of an order authorizing or approving the interception of a wire or oral communication (or each extension thereof) entered under section 2518, and within 60 days after the termination of any such interception, the person authorized to make such interception shall report to the Administrative Office of the United States Courts and to the Committees on the Judiciary of the Senate and House of Representatives the disposition of all records

(including any logs or summaries of any such interception) of any such interception and the identity of and action taken by all individuals who had access to any such interception."

(b) (1) Any information transmitted or submitted, pursuant to section 2519(a)(5) of title 18, United States Code (as added by subsection (a) of this section), to the Congress or to any standing, special, or select committee of either House of Congress or to any joint committee of the two Houses of Congress, shall be treated as a confidential communication and kept secret.

(2) Paragraph (1) of this subsection is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such shall be considered as a part of the rules of each House, respectively, or of that House to which it specifically applies, and such rule shall supersede other rules only to the extent that they are inconsistent therewith, and

(B) with full recognition of the constitutional right of either House to change such rule (so far as it relates to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

#### REPORTING AUTHORIZATIONS TO OPEN MAIL

SEC. 6. Chapter 205 of such title 18, is amended by adding at the end thereof the following new section:

"§ 3117. Reporting requirements in the case of warrants issued authorizing the opening of mail

"(a) Within 30 days after the date of issuance of a warrant to open any mail or the denial of such a warrant the person seeking such warrant shall report to the Administrative Office of the United States Courts and to the Committee on the Judiciary of the Senate and House of Representatives.

"(1) the fact that a warrant was applied for;

"(2) the fact that the warrant was issued as applied for, was modified, or was denied;

"(3) the offense specified in the warrant;

"(4) the identity of the investigative or law enforcement officer and the agency making the application and the person authorizing the application to be made;

"(5) the names of the sender and addressee of all mail opened pursuant to such warrant;

"(6) a copy of the approved warrant;

"(7) the nature of the facilities from which or the place where any such mail was opened; and

"(8) the disposition of all records (including any log, copy, or summary) of any such mail or the contents of such mail and the identity of and action taken by all individuals who had access to any such mail.

"(b) Within 60 days after the date of any warrant authorizing the opening of any mail, or the denial of any such warrant, the judge hearing the application for such warrant shall transmit to the Committee on the Judiciary of the Senate and House of Representatives a complete transcript of the proceeding."

#### TECHNICAL AMENDMENT

SEC. 7. The analysis of chapter 205 of such title 18 is amended by adding at the end thereof the following new item:

"3117. Reporting authorizations to open mail."

Senator MATHIAS. In the recently published final report of the Select Committee on Intelligence, this statement was made:

Since the early 1930s, intelligence agencies have frequently wiretapped and bugged American citizens, without the benefit of judicial warrant. Recent court decisions have curtailed the use of these techniques against domestic targets, but past subjects of these surveillances included a United States Congressman, a congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisors, and an anti-Vietnam war protest group. While prior written approval of the Attorney General has been required for all warrantless wiretaps since 1940, the record is replete with instances where this requirement was ignored and the Attorney General gave only after-the-fact authorization.

I think we have to take notice of the fact that beginning with President Franklin Roosevelt in 1940, every administration has asserted the right and, has actually conducted, warrantless wiretapping and bugging of Americans in national security cases. And it is to the credit of President Ford and Attorney General Levi that they are breaking, for the first time, with this longstanding executive tradition by submitting this legislation to Congress. I think that their motion, that the amount of distance that they have moved has to be noted.

In the absence of the checks provided by the judicial warrant requirement in this bill, as Senator Kennedy said before me, there is simply no way to check the abuse in this area.

There are three examples that I just mention very briefly. First was between January 1964 and October 1965, which is the famous surveillance conducted against Dr. Martin Luther King, and it is hard to find a national security excuse for this act. Second, the 17 wiretaps on journalists and Government employees, again impressively documented. And third, the incidental collection of information from electronic surveillance in the early 1960s, which revolved around sugar quota legislation. There were a total of 12 warrantless wiretaps on domestic and foreign targets; among the wiretaps of American citizens, there were two on lobbyists, three on executive branch officials, two on a staff member of the House of Representatives committee, and a bug was planted in the hotel room of our late colleague, Harold D. Cooley.

Now, it is hard to imagine—I don't know what more of a danger signal we need than to have the Members, congressional staffs, newsmen, members of the general public, being tapped. That is the abuse of power. I don't know what definition you would require.

The Supreme Court, I think, has affirmed that the central problem was in failure of the procedures that were then in use. The Court said that in a key case, the fourth amendment contemplates the prior judicial judgment, not the risk that Executive discretion may be reasonably exercised. This judicial role affords, with our basic constitutional doctrine, that individual freedoms will best be preserved through a separation of powers and a division of functions among the different branches of our Government. And that is really what the bill before the Committee contemplates, a division of functions.

It brings somebody else into the act. Under the old practice, the Attorney General could do it in his own office, under his own roof, with his own staff around him, and this way there is going to have to be some dispersal of that power.

I think the three other important features of the bill are that the judge may issue the warrant only where he finds there is probable cause to believe that the target of the wiretap is a foreign power or the agent of a foreign power, that he must find probable cause that the target is engaged in clandestine intelligence activities. I think that this is entirely consistent with the former Select Committee's recommendations in this area.

Now, I think there are some objections to this bill which are sound objections, and as I said at the beginning, I don't think it is perfect by any matter or means, but the provision of the bill concerning reservation of Presidential power is not sufficient grounds for killing the bill. We have no protection at all in this area now. The President,

this President and most of his modern predecessors have made large claims of power, inherent power in this area. We don't concede those claims by passing the bill, but the Court can make that perfectly clear. What we are simply doing is providing some safeguards where none exist today.

I think the Congress when voting to create your Committee clearly contemplated a new order in congressional oversight and review of intelligence activity by the executive branch, and I think this means that you have the opportunity and the support of the Congress to vigorously watch how this legislation will be enforced. You are going to see if it works. You are going to see if people overstep it. You are going to see if it is inadequate. If you want, put a time limit on it.

Senator BAYH. May I ask the Senator how we are going to oversee under the specific wording of the bill which the reporting procedures, as I understand them—and if I am wrong, tell me—are confined to a numerical reporting of the number of taps?

Senator MATHIAS. I think when you get the log of the number of taps under the resolution creating the Oversight Committee, you can call for additional information. I think that is just your threshold, your point of entry. I think you can pursue that and clearly have that right.

Senator BAYH. Well, I beg to differ. I would feel more comfortable if I felt the interpretation of the Senator from Maryland was correct. The way I see this bill, we really don't have anything available but the numbers, and one of the places I would like to look at how we came through this bill is making available the very kind of information that the Senator from Maryland is concerned about himself so that we can provide an oversight, so that a judge also can have a better view. Of course, that is arguably available to us.

Senator MATHIAS. Well, I might say to the chairman, when I earlier said that if you adopted the Bill of Rights Procedures Act, it might be an improvement, and in this particular regard, that is the case, because section 6—

Senator BAYH. Well, let's not proceed further.

Well, go ahead.

Senator CASE. Yes, I think this is the Senator's own bill, right?

Senator MATHIAS. Yes.

Senator CASE. How do you handle it there?

Senator MATHIAS. We provide in various parts—I was mentioning section 6; but there are other—we have provision here, for example, that:

Within 90 days after the date of an order authorizing or approving interception of a wire or oral communication, or each extension thereof, entered into under section 2518, within 60 days after the termination of such interception, the person authorized to make such interception shall report to the administrative officer of the United States courts, and to the Committee on the Judiciary of the Senate and the House of Representatives the disposition of all records, including logs and summaries of any such interception, and of the action taken by all individuals who have had any access to such interception.

Senator BAYH. Well, the Senator will concede that that language is much different than the language contained in the present bill.

Senator MATHIAS. But I honestly believe, as I understand the charter of your Committee, that you have every right to make further inquiries beyond just the bare statistics.

Senator GARN. Would the Senator yield on this point?



I don't think you were here when I was questioning Senator Kennedy at quite great length on this particular subject. I don't think Senate Resolution 400 has the force of law which seems appropriate to me to tie down in this legislation, because if we are going to provide oversight, not just in quantity, I think that the numbers are useless. So they had 87 wiretaps; so what? I think we need to know, if we are going to follow Senate Resolution 400, about the quality of those taps, what they were doing, what they were finding out. So I feel quite strongly that we ought to adopt some other language for this bill and not rely on Senate Resolution 400, which doesn't have the force of law.

Senator MATHIAS. Well, far be it from me, Senator, to dissuade you from adopting language of the sort that I proposed in my own bill. There it is, you have it. But I only can recall our own experience on the Select Committee, which was very good, and we had no more authority. The authority for the Select Committee didn't rise from any higher source than the authority for this committee, and when we requested information of the kind that I think you may need, it was available, it was forthcoming.

Senator GARN. Even if it was true, you would have no objection to tying it down in this bill.

Senator MATHIAS. No. If you can do it and the President will sign it, I am all for it, but I just urge some caution on how you proceed.

Senator CASE. Mr. Chairman, this is a very important subject, and I am glad we got on to it and got on to it very soon after the Senator started his testimony.

Is there anything in this act or bill that in any way permits this Committee, Congress, or the Senate to get information that otherwise might be subject to a claim of privilege on the part of the Executive? The determinations of a requirement of national security—can they be examined and the reasons for them under the language of this bill, or an amendment that might be drafted, or are we going to be up against a stone wall?

Senator MATHIAS. Well, I think you always, of course, have the danger that some arbitrary Executive is going to claim that he has some privilege which is going to protect him from the scrutiny of a congressional committee. I don't know any formula that is going to protect you from that. It is going to be the vigilance and the vigor of the committees in pursuing the interests that the Congress is here to protect. That is the only safeguard. I think really now, again, I view what you have here as a threshold, and you have to make the most of it.

Senator CASE. We understand that, of course, but the point I am trying to get at is do you think that technically, not now the question of whether the President will veto the bill, but technically, whether we might insert a requirement for review by this Committee of the determination without running into a claim of executive privilege. It seems to me that executive privilege is largely for the purpose of protecting the intercourse between the President's advisors and the President, and that when action of the White House through the security officer here starts in motion a process of this sort, including putting the Court's procedure in motion, that this then gets outside the area of executive privilege.

Senator MATHIAS. I think the Senator is exactly right. Once the tap has been placed, the action has been taken, beyond the advice or beyond the discussion. But as far as the privilege could possibly reach, you want to know what was done, how it was done, and what is the impact of the action and all that kind of thing, which I think is clearly within the right of a congressional committee to know. Certainly, as I say, I would endorse that idea of a specific right to examine these laws and efforts in my own bill, so I would hope that this Committee might be able to fashion something.

Senator CASE. Thank you, Mr. Chairman.

Senator BAYH. I fear we sort of horned in and got the Senator from Maryland off of his testimony.

Senator MATHIAS. Well, you have got the whole thing, Mr. Chairman.

Senator BAYH. Well, let me raise one more point I would like to get your impression on, where it seems to me that at least one can make a good argument that for the sake of defending the country and pursuing the assessment of information necessary of foreign intelligence to accomplish that goal, that one standard might be established that would be below that standard which would normally be required if we were talking about gathering information pursuant to bringing a criminal prosecution. Additionally, that has been done, right or wrong, and what concerns me here—and I would like to get the Senator's assessment, if he is familiar with section 2526, use of information, subsection (c)—seems to permit the use of information which is gathered under the less severe standards of protection of civil rights, individual rights, in the collection of intelligence data, to use information that is gathered under that warrant in a criminal prosecution which would require a higher standard of proof to be established before that kind of warrant would be permitted.

The Senator from Massachusetts argued that this was not the case, that there are protections available there. But I wonder—well, we can discuss this again with him because he is very sensitive to this I am sure. Is the Senator from Maryland concerned? Does he feel there is any possibility we might be lowering the bars there as far as criminal prosecution is concerned?

Senator MATHIAS. I think it is admittedly a difficult question. I think it is a question that is probably going to have to be adjudicated somewhere along the line, but I am not sure that it is central to the issue before this Committee. It seems to me that if we have in fact looked at or established two classes of warrants, which in fact is discussed by the Attorney General in his long and philosophical statement on the fourth amendment. He says, in fact, quoting Justice Powell in the *Keith* case, that different standards may be compatible with the fourth amendment if they are reasonable, both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens, for the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.

In other words, the Attorney General seems to say that the Government has an interest in enforcing the law, an interest in the question of detecting interest in criminals, but that isn't the sole interest of Government.

Senator BAYH. I fear I didn't phrase the question very succinctly. There is such a double standard. But the question is, does the language of this bill commingle them and permit a warrant ostensibly to collect foreign intelligence data which meets a lesser standard, nevertheless to collect information which is then used in a subsequent criminal trial without letting the defendant bring a focus to bear on the legality or illegality of the original issuance of the warrant?

Senator MATHIAS. This is going to be a question which the courts are going to wrestle with. I said earlier they are going to adjudicate. The Government will notify the Court of the source of the information. Then the Court will take in its discretion the duty of advising the defendant.

Senator BAYH. May I ask the Senator at his leisure, because I know how busy he is, to give special attention because I would like to have his opinion, to subsection (c) there of section 2526, which we have there a warrant which is issued to collect foreign intelligence, and criminal violations are discovered, and then the judge has an *in camera*, *ex parte* discussion of whether the surveillance was authorized and conducted in a manner which did not violate any right afforded by the Constitution of the person against whom the evidence was introduced. Thus, the individual himself and his lawyer are not a part or privy of determining the constitutionality of the issuance of the warrant. And then the judge may, it says, order disclosed to the person against whom such evidence was introduced this information.

I wonder if maybe we ought to strengthen that. And why don't I not pursue this further unless the Senator wants to because I think it is a delicate legal question, but the way I suggest right there, we are affecting what the thrust of the litigation that the Senator from Maryland suggests may be forthcoming.

Senator MATHIAS. Well, I think as the Senator said it is a delicate area. My own intuition on it is that, if it is a lawful search, properly authorized under this bill, that turns up something else, that that would probably be available. But that isn't a considered judgment. That is a question of intuition.

Senator BAKER. Mr. Chairman, of course, this whole thing is sort of modified a little by the *Brady* rule, and I don't believe there is anything in the proposed statute, as I read it, that would abrogate the availability of *Brady* to a defendant who might be impaled on the horns of this difficulty.

Say there was a wiretap and it did turn up something illegal, and that would start a fight at the Justice Department and there was a prosecution as a result of it. Assuming that the judge had tried to protect the constitutional rights of the *ex parte* defendant, under *Brady* once they ask for all that data and information; might I ask either Senator Mathias or you, Mr. Chairman, or anyone else, once they invoke their *Brady* rights and ask for all of their information, could they challenge the determination of the judge at that time that their constitutional rights were adequately protected in the first instance with the issuance of the warrant?

Senator BAYH. I don't know how to answer that question. What concerns me is that we don't know what the Supreme Court is going to rule as far as the collection of foreign intelligence is concerned.

Senator BAKER. Well, I don't know what the Supreme Court is going to rule about Presidential authority absent the statutory authority.

Senator MATHIAS. And I think this is probably one of the things that until the Supreme Court has acted, none of us are going to know the final action.

I am of the thought that assuming the warrant was lawful at the start, whatever its purpose, that whatever rights were available would be preserved.

Senator BAKER. Including the *Brady*.

Senator MATHIAS. I think so.

Senator BAKER. I would think so, too, and I would hope that the Committee and its staff would look into that because *Brady* has become such a cornerstone of the defendant's rights that that ought to be considered in relation to the procedures outlined in this bill.

Senator MATHIAS. I would hope the Committee, that while you have to be concerned about all aspects of any legislation having impact, that it did not overemphasize this point, however, because it seems to me that as a practical matter, criminal prosecution is not going to be the objective of this kind of an investigation.

Senator BAKER. No; but it is going to be the marvelously concentrating effect on a defendant's mind if it results.

Senator MATHIAS. But it may well be that the Government will not have any desire whatever to bring any of this into any courtroom at any time, so that I think the incidence of problems of this sort are likely to be very, very minimal because it has the effect, say if you are going to prosecute some relatively minor criminal infraction, of exposing a major counterespionage effort, and it is simply not in the interests of the Government to do it.

Senator BAKER. Mr. Chairman, I agree with the Senator. I think his appraisal and his ordering of the importance of the activities is accurate, but I think we ought to give careful attention to whether, if at all, we have diminished the available remedies and rights of a potential defendant by the passage of this.

Senator MATHIAS. Absolutely, and as I say, my intuition is that you don't diminish this.

Senator BAKER. I agree with that, and I certainly think that is the objective.

Senator MATHIAS. I think one of the basic things that this Committee can do is to look at the question of standards under which a warrant can issue and to broaden the standards and to provide for these other interests of the Government in addition to the question of criminal violations, and as I have pointed out in my full statement which the Committee has, I think this can relieve a lot of these problems.

Mr. Chairman, if there are no further questions, I will leave you with the words of that great late Marylander, Mr. H. L. Mencken, who, with his usual prescience, looked ahead, saw the opportunities available to this Committee when he said that conscience is the inner voice that warns us somebody may be looking.

Thank you very much.

Senator BAYH. And listening.

Thank you, Senator Mathias.

The next witness is Senator Mondale, waiting patiently. I know how busy everybody is. I regret the fact that we haven't been able to keep quite on schedule, but it is a great concern to all of us that the Senator from Minnesota bring his great background and experience before us, and I appreciate his being here.

[The prepared statement of Senator Mondale follows:]

PREPARED STATEMENT OF HON. WALTER F. MONDALE

A U.S. SENATOR FROM THE STATE OF MINNESOTA

Mr. Chairman: I'm pleased to be able to appear before this subcommittee today. As a former member of the previous investigative Select Committee, it gives me great satisfaction that there is a permanent Senate Select Committee on Intelligence Activities and that one of its first acts was to create this Subcommittee on Intelligence and the Rights of American Citizens. Please forgive me if I also view this Subcommittee as a sort of lineal descendant of my own Subcommittee, which dwelt at great length on the problem of intelligence activities and the rights of Americans.

It's also an honor to appear before this Subcommittee to address the proposed wiretap legislation. This is precisely the kind of issue that necessitated the creation of a new and permanent Intelligence Committee. The bill, itself, should be seen as one of a set of legislative actions that must be taken to create a statutory charter for our intelligence agencies so as to bring them within the framework of the rule of law. The action you take will set precedents for all the charter legislation to follow.

First, I want to compliment the Judiciary Committee and Senator Kennedy, in particular, for their excellent work on this legislation. Credit is due to Attorney General Levi for his efforts to try to work out a consensual solution on an issue which has, for too long, been an object of confrontation between the Congress and the Executive. Wiretap legislation involves extremely complicated issues which require balancing the needs of public order and security against the requirements and imperatives of our Constitution.

This bill, for the first time, seeks to bring under the rule of law the collection through electronic surveillance of foreign intelligence within the United States. Since electronic surveillance involves just about the most intrusive form of collection, this bill will, in effect, establish the standards and procedures for all other types of surveillance—informers, mail opening, et cetera, at least until there is additional explicit charter legislation. That is one reason why this bill deserves this Committee's most careful consideration. In concept and detail, it will be the forerunner of all charter legislation that may follow.

In concept, this bill focuses on enabling our Government to inform itself of the activities, intentions and policies of other Governments and their agents rather than on law enforcement. The bill seeks to establish a procedure whereby there will be, for the first time, a warrant procedure and judicial review of the use of electronic surveillance for these purposes. This is an important advantage over the present situation where the Executive acts at will. But the bill sets another precedent that I find disturbing. It would permit the most intrusive tapping and bugging against Americans who are not violating any law. I am referring to the provision which defines "agent of a foreign power," and which, in effect, would permit electronic surveillance of Americans allegedly engaged in undefined "clandestine intelligence activities" but not violating law.

I don't quarrel with the necessity of protecting our nation against hostile intelligence activities by foreign powers. We must be able to do that. I have no difficulty with the idea that electronic surveillance is a legitimate investigative technique against those who would conduct terrorism, sabotage, or assist in carrying out attacks or other hostile actions against the United States. These either are crimes or should be crimes.

But when it comes to authorizing bugs and taps on American citizens who are not engaged in crimes, we must proceed with utmost caution. We must bear in mind James Madison's observations on the eve of Congress' adoption of the infamous Alien and Sedition Acts. He wrote to Thomas Jefferson: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended from abroad."

My specific concern about this Bill is based upon the experience of the Select Committee. It came to the conclusion that no American should be targeted for electronic surveillance except upon a judicial finding of probable criminal activity.

Our conclusion was based on the Select Committee's examination of the full range of FBI intelligence activities and some of its most closely held files. This convinced us of the wisdom of Attorney General Harlan Fisk Stone's policy of limiting domestic intelligence agencies to investigating essentially only "such conduct as is forbidden by the laws of the United States." He explained his reasons for this policy as follows:

"There is always the possibility that a secret police may become a menace to free government and free institutions, because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood . . . The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish."

It was a wise policy: The common denominator of virtually all the abuses we uncovered was that domestic intelligence activities which depart from this standard pose grave risks of undermining the democratic process and harming the interests of individual Americans. Americans must be assured that their Government operates under the rule of law, and that if they conform their behavior to the law, they will not run the risk of being targeted for electronic surveillance and other intrusive investigative techniques.

One argument for permitting electronic surveillance for actions not now covered by law is based on the fact that our espionage laws are out of date. I am in full support of the concept of modernizing our espionage laws. That was one of the recommendations of the Select Committee.

Attorney General Levi, in arguing against establishing the criminal standard for foreign intelligence wiretaps against Americans cited three examples of situations where the Federal Government would need to be able to conduct electronic surveillance, but which do not now fall under the criminal law. These were as follows:

The clandestine collection of information by an agent of a foreign power concerning important industrial processes essential to the national security, e.g., computer technology.

The conduct of espionage or other clandestine intelligence activities by one foreign country against another inside the United States.

Third, Mr. Levi cited certain terrorist activities undertaken by a foreign-based terrorist group against State Governments, i.e., burning down a State Capitol building.

I am struck by these examples, because I believe that every one of them could be covered by the criminal law should we wish to do so. Indeed, some of them are, at least in part, covered by existing statute. For example, anyone who is clandestinely acquiring computer technology and exporting it abroad to a Communist country would stand in violation of two laws: First, the Foreign Agents Registration Act and, second, the Export Administration Act. I mention these because these are laws governing the activities of American citizens acting on behalf of foreign powers, and they should not be ignored.

Now I recognize the problem of trying to bring our espionage laws up-to-date, and the desirability of prompt action on this Bill. However, I am concerned by what I understand to be the Attorney General's position which seems to be that, even if we had the time to modernize these laws, he would not want to make crimes of all of the cases for which he would wish to be able to approve electronic surveillance of Americans. He has explained that any such law might be too broad.

I can sympathize with that. I understand—and I think we all can appreciate—how, in translating a concept to a law, we can sometimes go too far and adversely and unintentionally affect our Constitutional rights. Indeed, this wiretap legislation is an example of precisely that problem. We don't want to make this problem worse, but we cannot ignore it either.

It has been argued that the warrant procedure is a sufficient safeguard. Now I strongly agree that this represents an important step forward. But as significant as this step is, I do not believe that we can be satisfied that judicial review will provide an adequate remedy to the abuses which we uncovered in the course of the Senate Select Committee's investigation of domestic intelligence activities. For the question remains what standard will the judges apply in considering whether an American is engaged in "clandestine intelligence activity" so that a proposed electronic surveillance is legitimate. I believe it's extremely important that his Committee carefully consider how to deal with the extremely difficult problem of defining this term. For it is not simply a question of making language

more clear; it is a question of establishing a standard, a threshold beyond which American citizens must be put on notice that their Government is free to compromise their otherwise inalienable rights under the First and Fourth Amendments of the Constitution.

Now the recommendations of the old Select Committee used the term "clandestine intelligence activity"—at the specific request of the Department of Justice. But we explicitly recognized that this term must be defined and that this definition was a crucial one. We anticipated that this would take time and careful deliberation but were unwilling, in the meantime, to accept such an undefined standard for electronic surveillance and other intrusive measures.

And it should be borne in mind that establishing this vague standard will not simply authorize electronic surveillance; it also opens the door to a wide range of other techniques that may not fit the standard. The legislation obviously assumes that the FBI conducts intelligence investigations, including intrusive techniques such as informants, which will culminate in requests for wiretaps pursuant to S. 3197. Therefore the bill would authorize—by implication—the placing of an informant within the Southern Christian Leadership Conference to spy on Dr. King, to see if indeed he was an agent controlled by a foreign power. It would appear to permit black bag jobs, surreptitious entries, so as to be able to place microphones. It might be construed as permitting a mail cover. There is a whole range of activities leading up to the most intrusive electronic surveillance which, presumably, would have an even less rigorous standard than that established by this bill.

This, of course, is one of the problems of trying to deal with wiretap legislation in isolation. In the course of the Select Committee's deliberations, we recognized that this domestic intelligence is a seamless web: that one form of investigative technique blends into another. That the justification for one kind of intrusion into the privacy of Americans begets another. That rationales for one type of surveillance become justifications for yet another. That the standards keep broadening, that the scope of the activity continues to grow; that the number of people involved continues to increase, unless you have the hard and fast standard of the criminal law.

Let's examine the definitions in the Bill. It would permit wiretapping of Americans involved in "clandestine intelligence activities . . . under the direction of a foreign power," or who are aiding and abetting such a person. And, it would do so in order to collect information which is essential to the security, national defense or the conduct of the foreign affairs of the United States. If we have learned anything from the experience of the last ten years, it is that the last phrase is almost infinitely elastic. For example, it would clearly authorize one of the abuses we found during the Kennedy Administration—of tapping phones on Capitol Hill in regard to the activities of the Sugar Lobby.

In shaping adequate definitions, we have to recognize that the world is becoming more interdependent. Activities of Governments within the United States, and the activities of our Government in other countries, involves the activities of private citizens. Such activities fall into the category of affecting the foreign relations. Whether an activity is confidential, or clandestine, can be difficult to say. And there are no guideposts in this legislation.

The problem becomes even more complicated if we consider the fact that this legislation would define an American "under the direction of a foreign power" to include Americans working for or aiding and abetting foreign enterprises tied to their Governments. I recognize that this is aimed at certain Soviet State enterprises; and that is a perfectly legitimate objective. But an increasing number of countries have government-run enterprises. What about Algeria? What about Iran? Numerous countries around the world have quasi-governmental commercial enterprises owned in whole or in part by Governments.

Under this arrangement, would the Attorney General be free to request a wiretap on Clark Clifford, or Richard Kleindienst? Both of them work for Sonatrach, Algerian's state-run oil company. Only a week-and-a-half ago, Parade Magazine had on its cover several prominent Americans, including ex-Senator Fulbright, former Secretary of State and Attorney General William Rogers—all of whom were, it claimed, working for foreign governments in one capacity or another. What would this legislation do about activities carried out by these gentlemen if they were confidential in character?

I don't know the answers to those questions. And I'm afraid that if I were elevated to the bench, and were appointed to review wiretaps under this bill, I still wouldn't know the answers to this question. The bill, as it stands, simply does not provide adequate guidance in this regard.

Now some further refinement may come when the Committee issues its Report. I would strongly urge this committee to carefully consider that report before issuing its own.

Let me conclude by saying that what disturbs me most of all as I look at the legislation is that I'm not at all certain that the abuses of the past won't easily be repeated. I recognize that there is a warrant procedure which imposes some safeguard. And I appreciate that a fair reading of the Bill might give less cause for concern. But this bill should not just authorize wiretaps; it should prevent abuse. We must safeguard going beyond a fair reading of its intent. In the absence of a real standard—not a flexible one like national security, not an undefined one like clandestine intelligence activities, or information related to the conduct of foreign policy—I could see the King case being repeated, I can see Operation CHAOS, the penetration of legitimate protest movements, the black bag jobs and the whole unhappy story that we spent the last-year-and-a-half uncovering.

I recognize that it would be convenient, it would be helpful, it might even be considered necessary for the Government to acquire information in areas that have no relationship to the criminal law. But I would recall the warning of William Pitt, made 200 years ago:

"Necessity is the plea for every infringement of human liberty; it is the argument of tyrants; it is the creed of slaves."

Let's give the criminal law a chance. Let's not establish a precedent that may be impossible to reverse.

Recognizing the procedural safeguards that would be provided by the new legislation I, nonetheless, strongly urge that there be a modification of the present language of the proposed bill. In my view, the way to make probable criminal activity the standard for wiretapping, yet cover the kinds of concerns that were reflected by the Administration before the Committee, would be as follows: permit wiretapping in cases involving clandestine intelligence activity which are violations of law and, for a period of two years, additional clandestine intelligence activities publicly spelled out by the Attorney General. Both, of course, would require a judicial warrant.

Without some such incentive to seek a modernization of existing law, I believe the Executive Branch will be content with the discretionary authority which would be contained in the present draft of S. 3197. A formulation along the lines that I have proposed would fully protect the flexibility of the Executive Branch to investigate certain kinds of clandestine intelligence activity but would require that they define such activity and make such a definition public. It would also create the greatest possible incentives for the Executive Branch to come forward with proposed statutes to deal with the matter.

## **TESTIMONY OF HON. WALTER F. MONDALE, A U.S. SENATOR FROM THE STATE OF MINNESOTA**

Senator MONDALE. Thank you very much, Mr. Chairman and members of the committee. I am very pleased to be here and very pleased to see the permanent Committee on Intelligence in operation, to deal with perhaps the most important issue that affects Americans, namely, their liberties and their rights and their security. I consider the creation of this committee to be one of the most important things Congress has ever accomplished, and our hopes and trust rest with this committee to draw that terribly difficult line between security and liberties, a dispute that has dogged this Nation from the beginning and one which, thank God, on every occasion we came down on the side of liberty, and in so doing, secured this Nation's future.

Mr. Chairman, I have a longer statement, and I don't propose to read it all, but I would like to begin with a few observations if I might.

First of all, I believe it is crucial that the committee recognize that this first issue that you face in the form of this bill may be the most important issue you face possibly in many years. It is full of many opportunities and it is full of many dangers.



The bill in its present form, for example, I think clearly recognizes the existence, in section 2528, of an inherent Presidential authority to go around the law as it affects the rights of Americans. That decision itself collides with the first and most important recommendation of the previous committee, that there should be no inherent authority found in the President to in effect violate the law.

Recommendation 1 was, in our opinion, our most important recommendation, because if you accept the inherent authority of the President to violate the law, then it matters little how you write the law, and you rest in the President the authority to determine on his own when and how and where he should do so. And that, of course, is the single most dangerous possibility. I think to avoid that danger is precisely why we have a Constitution of the United States.

It was the Presidential notion of such inherent authority to do as he pleased that led to the creation of the committee in the first place. The exaggerated notions of national security that have been reflected really from World War I into World War II, under the different Presidents, and then exercised in its most exaggerated notions as the key defense in Watergate, tells us without any doubt that if you concede the existence of that inherent authority to violate the constitutional rights of Americans, little else that you do matters very much.

And so I would begin with a fervent plea that the language found on page 18 of this bill be deleted or at the very least be written so that it is exactly neutral on the question of whether such authority exists or not.

It is ironic that the language is here for the purpose, I am sure, of permitting the NSA to conduct surveillance against Americans which NSA itself does not wish to conduct. We have the ironic situation with the Justice Department, which has been established to protect the constitutional rights of the American people, urging the agency, the power for an agency, that the agency itself does not want, and in my opinion does not need.

Second, this bill establishes directly the authority that has been missing until now to conduct so-called domestic intelligence against Americans. The right to do so, the authority to do so has been one that has been assumed by stealth, privately by the Government over the last 50 years. It is not found in the law. The adoption of this bill would establish, by law, the right of the Government to conduct investigations against Americans who are not violating any laws, and to do so on the basis of standards that are so general that practically anyone can be subject to investigation.

In the past, court warrants have been issued based on very precise standards. Where an application for a warrant is made, the court has been asked to determine on very precise standards whether a crime has been committed, or is about to be committed, and then to specify particularly the place and the objects to be searched.

This warrant authority found in this bill requires no allegation of crime, and is so general that a judge, in effect, is left on his own to issue or not issue a warrant, depending on how he feels that day. While I applaud the Justice Department for finally accepting the notion of a warrant in this field, I think it is fraught with a great many dangers.

Senator BAYH. Would the Senator yield?

Senator MONDALE. Yes.

Senator BAYH. He was sitting in the hearing room I think when I was addressing myself to a related point to the Senator from Maryland. Not only is the issuance of the warrant made possible, but does the Senator from Minnesota share the concern of the Senator from Indiana that under section 2526, subsection (c), once the warrant is issued, ostensibly for the collection of national security or foreign policy related information, the warrant meeting the standard of the statute, it is significantly lower than the standard just discussed by the Senator from Minnesota—but nevertheless, that information can be used in a subsequent criminal trial.

Senator MONDALE. I don't know about that. I think that is what Senator Baker was asking, but that is not the point. That is a point, but the fact is that if you get the right of Government to investigate Americans for things that are not crimes, there are ways of destroying that person without ever appearing in a courtroom. That is what COINTELPRO was all about. If you can snoop and pry, you can use these investigations for political purposes, to destroy public reputations, and the mere fact of investigating a person can be used to chill constitutional rights.

In other words, the power to investigate is an incredible power. We must have it, but it must be exercised in a way that is consistent with the constitutional rights of the American people. And we have a record spanning administrations of both political parties over many years where the right to investigate was used to intimidate and chill political opposition and the unpopular in American life. That's why they were going after Dr. King. They never intended it to show up in a courtroom. They knew he wasn't violating any laws. They knew he wasn't a Communist. They knew he wasn't violent. They just didn't like him. So they harassed that wonderful man all over this country and tried to knock him off his pedestal.

It was the effort to use the police power of this country informally to achieve a political objective. That was the danger there, and the record shows, not just with Dr. King, but in hundreds of cases, over many different years, in different administrations; that if you cloak an administration with an ill-defined power to investigate Americans outside the law, and in total disregard of their constitutional rights, it is inevitable that the police will be used to achieve political purposes, which is the most abhorrent objective and fear that we sought to avoid in the creation of the Constitution and the adoption of the Bill of Rights. So I think the enormity of the dangers here, particularly where we pass legislation to permit it—up until now it has been their fault, but now we know, and if we authorize it from here on out, it is our fault.

Now, the final point I want to make is, why do they want this authority? Why do they want the authority to investigate Americans who are not violating laws? I think it stems from a feeling, often unexpressed, when you get right down to it, they do not believe that the Constitution provides enough power to government to defend this nation from her real enemies under the Constitution, that deep down, the only way you can defend this nation is by ignoring the Constitution and the law in periods of great danger.

I think that is as wrong as it can be. The Constitution gives plenty of power, plenty of power to defend this country from real danger.

What it does do, on the other hand, is to draw the line between prohibited conduct on the one hand and unpopular ideas on the other. That is the most important line drawn in the Constitution, but what Government seeks to, always wants to do, it doesn't want to let loose. It wants to continue to have that right to fool around with unpopular ideas, with Americans they don't like or with Americans they wish had less popularity than they have.

Now, what is the big danger to America? Is it a fear that Americans are not loyal? Is it a fear that unloyal Americans can subvert this country? Is it a fear that we are shot through with spies, shot through with Communists, shot through with violent terrorists? Is that the greatest danger to America?

First of all, if it is, there are plenty of ways through the law to get those people. If laws against terrorism are not tough enough, toughen them up. If the laws against those who wish to riot is not tough enough, pass tougher laws. If the laws against espionage are not strong enough, and I don't think they are, strengthen the espionage laws. If the laws against foreign spying are not tough enough, strengthen them, and then go after those people who are endangering this country based on the law, and based on the constitutional rights.

They don't want to do that. They want to say there are vague dangers, ill-defined, not based on experience, that require us to go beyond the law; to risk constitutional rights, to protect us from dangers that they can't define. Now, I say that with some strength, because that is what we did with our subcommittee. I said Senator Baker was the cochairman of that committee. Justice Holmes once said—

Senator BAKER. I might just briefly say that while I shared with you the honor of being the co-chairman, I also filed dissenting views.

Senator MONDALE. That is right, but they were responsible dissents. I think you agree with most of what I am saying here.

Senator BAKER. Yes, I will agree with most, and I'll save back the other until later.

Senator MONDALE. Save it until tomorrow.

Justice Holmes once said the life of the law is based on experience not logic. That is a quote that Attorney General Levi has never heard or didn't believe if he heard it, because he loves to talk about logic, about dangers that cannot be defined. What we did was to ask, "What are your fears? Why do you want this authority?" and then we went to experience. We looked through the files of the Bureau in a way they had never been looked at before, and we found that most of the dangers they talked about were illegal and could be handled under the law, that those that couldn't be reached under the present law, could be reached by strengthening the law, and all of our dangers that they are talking about, riots, spying, terrorism, can be handled legally. There is no need to go outside the law.

If that is true, then the question is, where does the real danger to American liberty and security rest? Where is it to be found? And I think it is to be found exactly where the founders of this country feared it would be found, in governmental abuse. We have had 50 years of real experience where people in high public office, beginning with the Palmer raids, the concentration camps in which we put Jap-

anese-Americans in World War II, COINTELPRO and all these programs, where we went after imagined fears, and that is all they were. But we created a real fear, the abuse of people's rights, the destruction of the public faith and trust, in a way to really jeopardize the future of this country.

There is far more to be gained by pursuing the law and constitutional rights in terms of defending this nation's security, and we can do it that way. If you proceed the other way, I am convinced in a few years this committee is going to be hearing a repetition of the very abuses that we went through. For that reason, while I applaud the notion of warrants for all these taps, and I think the Attorney General and those who are on this bill deserve credit for that, I think it should be tied into law. I think we should strengthen the underlying law, such as the espionage law, and deal with it in a due process way.

If it is felt that we don't have time to do that—I don't buy that argument—but if that is the reason, I agree with Senator Mathias, we should have a 2-year period during which we would let them pursue these strategies outside the law, as defined in this bill, and use that 2-year interval to reform the law, amend the law so we have got all of the legal tools that we need. Finally, I would hope you would take this language out about inherent authority because if you don't, I think it is inevitable that Presidents will feel they have a right to do as they see fit, and I think that can destroy this country.

Senator BAYH. I want to say to the Senator from Minnesota that I think his testimony has been very revealing. The rather vintage quote of Justice Holmes is really yesterday America, and hopefully not tomorrow. Without prejudging how we finally dispose of this bill and what the final language is, I think the real tragedy would be not to have learned from the recent experiences which have shaken the confidence of millions of Americans in their governmental structure.

Let me just ask one question, and I think that we find colleagues who are equally dedicated to the protection of civil rights and individual liberties arrayed on either side of this bill, pro and con, and on either side of the amendments or the effecting language that would be suggested. How do you respond, Senator Mondale, to Senator Kennedy's contention that this bill is the best we are going to get, that we are better off with the provisions of this bill, putting it into court than letting the power reside where it has been, down at the Oval Office alone?

Senator MONDALE. Well, as I understand Senator Kennedy's response on certain questions, he ended up pretty much as saying that he would like Senator Mathias' proposal, say, for a 2-year termination point so that we could use this 2 years to strengthen the laws that need strengthening, the underlying laws such as the espionage law which is completely out of date.

If you are a Russian spy and you report on where the tanks are parked in Fort Knox, Ky., you are guilty of espionage, but if you spy on modern computer technology and thereby find out how to make a more advanced Russian missile, you are not. Now, that is obviously ridiculous. That kind of spying ought to be a very high felony in American modern life. It should be and I think we ought to amend the espionage law to bring it up to date, to make it as strong and as stiff as is necessary, but require that they stay within the law, and

give us 2 years within which to make those changes. Let them have this limited authority to investigate spying as defined in this law in the meantime.

I would also come down very strongly in taking out this inherent authority. Here is what it says:

The facts and the circumstances give rise to the acquisition, are so unprecedented and potentially harmful to the Nation that they cannot be reasonably said to have been within the contemplation of Congress.

What are they talking about? You know, this nation wasn't born yesterday. We have 200 years of experience. We have had spies around here a long time. We know what they do. We know all of the dangers. There is no need to have this vague penumbral residual authority in the White House—defined: the right to violate American rights outside the law. There is nothing based on the experience of this nation's history that justifies that concession to the White House, and if you do, they will say that they have the authority whenever they believe that there is a danger to this country, to go outside the law. It couldn't be more dangerous.

And if you wonder how far a President can go on that theory, read the answer of Mr. Nixon to our interrogatories in which he stated under oath that it was his belief that the President possesses the right to violate the law when he deems it necessary.

Senator BAYH. May I come back to that original question?

It seems to me that this is the tough bullet that we are going to have to bite. Senator Kennedy expressed his willingness, as I heard him, and having talked with him earlier, and worked with him on Judiciary, I know he is very sensitive to a number of these positions, as the Senator from Minnesota is—expressed a willingness in his own personal position to accept a number of changes.

He more than anybody else, I suppose, has been involved in negotiations with the Justice Department. Now, the Justice Department is going to be testifying here shortly, I hope, and we will have a chance to get their opinion on this. But when it comes right down to it, if we are confronted with Justice Department opposition, that doesn't mean we shouldn't proceed as those of us who might be on the other side see fit.

If that means that there are not going to be sufficient votes in Congress to pass a bill, then it is going to get back to the question of whether you believe that—you mentioned a 2-year provision. If we are faced with this measure or nothing; are we better off with nothing, or are we better off with this bill?

Senator MONDALE. Well, if it has that inherent authority language, as I read on page 18; it is clearly better not to have the bill because that will be used by a President sometime down the line to justify anything he wishes to do. As I say, I like the idea, and I commend the Justice Department and the others for conceding that these matters ought to be brought to the courts for a warrant. That is what is strong in this bill that I like.

What I find unacceptable is that there are no standards, and that it accepts for the first time the right to tap an American for conduct that is not a crime. That opens up a vast opportunity to spy on Americans illegally for things that are not illegal. I would just hope that we could redesign this bill in a way that accepts the strongest

point here, namely, you have to get a court warrant, but then goes on to strengthen the law so that they are investigating crimes and not legal conduct. That is what I would like to see this law contemplate. If it is thought that we don't have time to do that, then pass it this way, but make it clear that in 2 years that authority expires, as Senator Mathias has proposed, unless we manage to change the law in a way that permits us to investigate all these matters that we feel risk this nation's security, which I see no reason why we can't do it.

Senator GARN. Senator, I am really quite puzzled by this line of thinking. Right now it is totally open, it has been. Every witness has testified that Presidents for 50 years have done this. They have to have no warrant. They don't have to tell anyone about it potentially. It has happened over and over again. I happen to support this bill, and I really cannot understand that even when the inherent right of the President, the disclaimer there, that anyone could say, "Let's go ahead with what we have now, even if it is only a piece of the apple we have talked about, even if it is only half a loaf." I am really puzzled by that.

Excuse me just a minute.

As Senator Kennedy and the others testified, they feel that section, which I specifically asked them about, is neutral, and it is something that will not be determined by legislation but will have to be determined in the courts. I would agree with that.

Again I am puzzled that someone would rather have nothing than allow what has gone on to continue, rather than what is a considerable step forward, a vast tightening compared to what we have now.

Senator MONDALE. I agree that in requiring the warrant it is a step forward. I concede that. But insofar as it, for the first time, grants congressional authority to investigate Americans for conduct that does not constitute a crime, it is not a vast step forward, it is a very dangerous, retrogressive step. The Congress has never granted this authority before, and we will be doing it for the first time, and I think it is very serious.

Finally, may I say, I read that language in 18 as not at all neutral. I think it implies the existence of an inherent Presidential authority to go outside the law, and I don't think anything could be more dangerous.

Senator GARN. Well, as far as investigating American citizens, under the definitions, at least as I read the bill, a person, pursuant to the direction of a foreign power, has to be engaged in clandestine intelligence activities, sabotage, or terrorist activities, or conspire with or knowingly aid and abet such a person engaging in such activities. Now, it seems to me that is fairly tight, too. I don't want them just going out indiscriminately investigating Americans, me or you, or anyone else, but I don't intend to be knowingly employed by a foreign power, or aiding or abetting a foreign agent. Under the warrant procedure, I would expect that a judge would not grant that warrant without those things having been established.

Senator MONDALE. I think you could shoot 100 holes through that definition, and you could investigate half the lawyers in town on this. Any person who is working for a foreign country on a commercial deal, anybody who is working in public relations——

Senator GARN. Well, two points. It has to be clandestine, and it has to be secret.

Senator MONDALE. Well, a lot of lawyers represent clients without being public about it. I mean, if we are worried about spying, Senator, if we think there are Americans—I am not talking about foreigners, we are talking about the rights of American citizens—if we are worried that there are American citizens who are serving as spies, who are representing foreign powers and collecting intelligence for a foreign power, why don't we simply—and we don't think the law reaches that now—why don't we simply change the law to prohibit it? Then we can go after these people, under the law, consistent with the rights found in the Constitution? What is there that causes us to believe that conduct can be both legal and dangerous at the same time? That is what I don't understand, and if you accept that new notion, then it will be the first time in American law that we have ever accepted that. I think you would be opening up a Pandora's box.

Senator GARN. Well, I fail to see the logic. Even if you can shoot 100 holes in this language, right now, there is no language to shoot holes in. It does tighten it. Right now they can do exactly what you and I both agree on should not be done.

One followup question.

Senator MONDALE. Well, let me respond to that. Senator, I think if you had seen as we did the tremendous way in which rights can be abused, you would be very sensitive to the need for tying down those rights as clearly as possible. The slightest vagueness can be used and expanded beyond recognition, particularly where you are investigating people for something as serious as working with a foreign power, and I think if they are, they should be investigated. But it should be an investigation based on a criminal allegation and based on the constitutional protections that ought to be the sacred right of every American.

What we are saying here is that you ought to have the right to investigate, even though what the American is doing is by definition legal. If I were the Attorney General and I wanted to, I could destroy a person under the provisions of this act who had done nothing wrong under the laws of the United States. I don't think that a country that believes in justice and liberty should accept that kind of authority.

Senator GARN. Senator, I don't disagree with what you are saying. We don't disagree with what we would both like to achieve. I just fail again to understand that even though this doesn't go as far as you would like to, that it isn't better than leaving it totally open and at the discretion of a President as it now exists. And the other point—

Senator MONDALE. Well, it does not exist that way today. It is true that Mr. Nixon and some before him claimed this authority, but they didn't have it, and in exercising the authority, they claimed that we would give it to them. They could claim that as a matter of right under this bill and it would be open season, outside the law. Now, you may think that is a compromise, but it is a compromise in the wrong direction.

Senator GARN. They used it without the restrictions of this particular bill. Again I say it tightens it.

The other point I wanted to ask you about, which I asked the other witnesses, the reporting section of this which only requires numbers. There is no doubt in my mind that this section is really meaningless now, with the vague definition of clandestine intelligence activities. Wouldn't this be an area of tightening by this committee, having substantive reports of electronic surveillance going on so that we would know rather than just numbers which would not indicate whether people were being abused or not. Isn't that an important safeguard and check and balance that this committee have that section strengthened?

Senator MONDALE. But it is not defined. I think what we should do is define what kind of clandestine intelligence operations we deem to be illegal. Bite the bullet. What is it that we do not want Americans to do, precisely? What is it that an American can do, precisely? Spell it out. And then not only investigate illegal conduct, but serve notice in the way a civilized society ought to, as to what can and cannot be done by an American citizen.

That isn't what this bill does. This bill says an American may be doing something that is absolutely legal, but he can still be investigated, and Senator, if he can be investigated, he can be abused. That is what the record clearly shows, and I don't think Americans should be put in that kind of half-light. I think it is very dangerous.

Senator GARN. Well, just one more thing in direct response to my question. You would still agree, I would assume, even if it was tied down the way you would like to see it, that this committee ought to have oversight and more substance in what was going on rather than just the numbers.

Senator MONDALE. Absolutely, and if that is what you are, I couldn't agree more. If you are not given the authority to know what is really going on, if you are given sterile figures that are in fact delivered to you, then in fact you can't possibly know what is going on, and then you can't possibly do your job.

Senator GARN. Let me ask one more question. When I was mayor of Salt Lake City, there were times where, not through electronic surveillance necessarily, and there was nothing illegal going on, but there was a particular threat to some public buildings of some bombs. There was no criminal activity that had been committed, because it was prevented by having knowledge that this was contemplated and being planned, and the blowing up of some public buildings was prevented because of intelligence activities.

That doesn't directly relate to foreign activities, but in my own opinion I think there is some time when it is justified. I would hate to have been mayor and said, "OK, this beautiful building was blown up and 30 people were killed because I wasn't going to find out what people were going on because they had not yet done anything illegal."

Senator MONDALE. That is a very important question because no one wants a building bombed. Under the law you can investigate the very case you are talking about, because to conspire, to plan to bomb a building is a crime, and you can get a court warrant and you can go after those problems. This is why I keep coming back to this argument that we kept hearing by implication from so many people; that is, that we cannot defend this nation from real dangers, or your city hall from bombing, within the confines of the law. You can.



People cannot plan to bomb a building and be immune from investigation. There is plenty of power to do everything this nation needs to do against terrorists, against spies, against rioters, and we can do it within the law, and I base that on looking at the experience. That is the first argument we heard from the Bureau. We looked through the files, not at logic but at files, experience, and I think in every case we found those could be investigated under the law. Where the law is too weak, as it is in espionage, strengthen the law. Make it clear to Americans, if you do this sort of thing, you are going to the slammer. Don't leave it the way it is now.

I am an old attorney general. I don't like this kind of illegal activity or dangerous activity, but I think that it is just as dangerous, and perhaps more seditious to give the Government authority to abuse people's constitutional rights. We can have liberty and we can have security, but some people in Government think you cannot have security unless you give way on liberties. As a matter of fact, the Attorney General once said we have to give up some liberties in order to protect other liberties, and I asked him what. Do you want in the light of this record in secret, people in high public office making those judgments about which liberties are going to be abandoned and which are not? I think not. It will destroy this country.

Pardon me. Kelley made that. I was wrong. It was Mr. Kelley that made that statement.

Senator BAYH. The Senator from Delaware?

Senator BIDEN. Thank you very much. I would like to pick up where Senator Garn left off in making the record clear.

As a criminal defense lawyer, I would have a great deal of trouble finding, proving my clients not guilty or immune to the law when they conspired to blow up a building. Clearly it should be on the record that absolutely, unequivocally, under every state law that I know of, and under any Federal law, if it is a Federal building, that someone who sits down and conspires, whether or not they acted out in any way, is guilty of a crime.

Senator CASE. Would the Senator yield?

Senator BIDEN. Sure.

Senator CASE. Suppose you didn't conspire with somebody else to do this? Suppose he just wrote a letter to his wife saying tomorrow I am going to do this? Now, that is not a crime, is it? I wonder if the Senator from Minnesota would care to answer that? The question I am raising is, is it necessary to limit things that are overheard to things that are crimes, and if that is a realistic and adequate place to draw the line?

Senator MONDALE. We spend a lot of time going over this kind of problem because that is at the very end of what is investigatable and what is not investigatable, and what we finally came down with is that it depends a little bit upon the intrusiveness of the technique.

For example, we would let the Bureau have informants in groups around persons that we suspected might be thinking about terror or spying or riots. They could be around. But we would not let them use the more intrusive techniques of taps and bugs, black bag jobs and the rest unless there were a crime or a potential crime based on court warrants. So in other words, the more nebulous the fear, the less intrusive should be the technique. That is how we tried to draw that line. It gets very detailed, and you will find—

Senator CASE. Well, you see, there is a very real danger from the people who are mentally unsound, from the true believers, from the political crusaders, from the people who believe this system is wrong and anything is justified, and an unconspired intention of a person possessed of that feeling is a very dangerous situation.

Senator MONDALE. That's right, and you could have informants around such a person under our proposals, but here you are talking about wiretaps and so on, see the problem you get into and the difficulty of drawing a line.

For example, for 15 years they investigated Martin Luther King. One of their arguments is he might resort to terror. He never did resort to terror, but someone thought someone might talk him into resorting to terror, and so they used that excuse to investigate this man who was operating in a wholly legal way. So it is very important to draw that line with very great care as to when you can start an investigation, what techniques you can use, and on what basis. Otherwise it is open season.

A good deal of the detail in our report, Senator Case, tries to home in on that question so that we will have the authority to defend ourselves from real risks without opening the door to just anything that they want to do.

Senator CASE. Thank you.

Senator BIDEN. Thank you.

I think it is important for the record that we have a competent attorney respond to your specific question, because this is the kind of thing that leads people to say that we have to have this kind of law to protect against bombings, whether or not a person who makes an utterance that they are going to blow up a building, even if it is only to their wife, is guilty of a criminal offense under any existing law, state or federal.

I think that they are, based on my understanding of the law, particularly if beyond that utterance there is, in fact, anything such as a wire, dynamite, or anything else that might be used in a bomb even though they never use it. You cannot convict a man of a thought, but you can convict a man or a woman of an offense under our criminal codes if the thought is in any way related to their ability to execute that action.

Senator CASE. You mean as an attempt.

Senator BIDEN. It may not be attempted. It may not be attempted, and that's why—I may be mistaken on that, but I would like that cleared for the record. My understanding is it need not be attempted. If I say I am going to blow up a building and I make an utterance to a third party that that is going to be done, and I have the facility and capability to blow up that building found in my basement, I am guilty of conspiring to blow up that building. I am guilty of a criminal offense I think, but I hope the record would be cleared on this. But that gets us off the point.

Senator MONDALE. Well, we came to grips with that in very great detail. You don't have to create a crime. If there is an imminent danger of a specified crime, you can get a warrant. In other words, if there is an incipient problem, you can get a warrant. The reason this line has to be drawn with care, it comes out in our report very clearly because the usual excuse for going after people who weren't violating

crimes is that they were afraid they might, and in some cases there was no way of dissuading them.

For example, the Socialist Workers Party was under surveillance for 40 years on the grounds that they were about to commit violence. They never did once in 40 years, but they investigated it for 40 years anyway. And one wonders after, say, maybe 20 years of nothing happening—and this even lasted after Hoover died. This even lasted after Hoover, and they still kept investigating, and they never fulfilled their expectations. So you have to be careful.

Senator BIDEN. Well, I have several specific questions, but first I would like to compliment the Senator from Minnesota on a very eloquent, a very persuasive statement. I really—you were really good in my opinion.

The few specific questions I have, would any of the abuses that you uncovered in your select committee activity be able to go on under the provisions of this bill?

Senator MONDALE. We think so. The legislation obviously assumes that the FBI conducts intelligence investigations, including intrusive techniques such as informants, which will culminate in requests for wiretaps pursuant to S. 3197. Therefore the bill would authorize, by implication, the placing of an informant within the Southern Christian Leadership Conference to spy on Dr. King, to see, if indeed, he was an agent controlled by a foreign power. One of the allegations was that King was a Communist or about to become a Communist. He never was, but that was one of the things they kept using to try to justify it.

We think that under this so-called secret or foreign intelligence, that they might be able to check on Clark Clifford or a Richard Kleindienst. A week and a half ago Parade Magazine had on its cover several prominent Americans, Senator Fulbright, former Secretary of State William Rogers, who were claimed to be working for foreign governments in one capacity or another. As I read this bill, I am not so sure any of them could be safe from investigation, even though none of them were guilty of a crime.

Senator BIDEN. There are some that argue here that the intent of the language of the inherent authority section that you are most upset about on the inherent authority, was specifically to leave the question neutral, not to alter it in any way. You obviously reject that argument, but can you give us any specific reason or justification for rejection?

Senator MONDALE. Well, Senator, I would like to respond to this by letter if I might, for the record.

When I read that subpart (b) there, "the facts and the circumstances giving rise to it are so unprecedented and are potentially harmful to the nation that they cannot be reasonably said to have been within the contemplation of Congress," that would seem to suggest that the President has the authority somewhere to be found; to investigate an American not committing a crime, whose activities are not prohibited, and that I think it carries with it an implication of inherent presidential authority.

I would like to respond to that by letter if I might.

The other thing I would like to say about this provision, I am convinced this is in here to authorize NSA to investigate Americans, something NSA does not want to do.

Senator BIDEN. Thank you. I look forward to your response also.

As you have picked up from around this table, there are some of us up here who feel as you do about the requirements, the needs for a requirement that there be a criminal violation, and there is a persuasive argument that it has to be a law, and it doesn't go far enough, and the counterargument that it takes too much time to alter the criminal code, the espionage laws, and therefore we should move ahead.

Now, I asked Senator Kennedy that question. I didn't think of it at the time when he responded, but I thought he implied that the only way we are going to revise the espionage law is to revise the entire criminal code. He may not have meant that, but I ask you directly, as a practical political matter, do you believe we can get to amending the espionage laws without having to go through the entire rewrite of the entire criminal code which is needed?

Senator MONDALE. I think we could and I think we should. I mean, it is an outrage that an American can work for the Soviet Union and steal computer secrets, other high technology, how to make ball bearings and the rest, if that story was correct, and to provide to the Russians for pay something that could be very crucial to them and very disadvantageous to us, and do it legally. That ought to be against the law. Somebody that does something like that ought to go into the slammer for a very long, long time and not just be investigated.

So I think it is of sufficient importance, we should do it immediately. However, if it is felt we don't have the time right now, I think we ought to say that we ought to have 2 years during which we will pursue the theory found in this bill before us. We should use the 2-year interval to make illegal things which should be illegal because they are dangerous to us, at which time the authority to investigate Americans for otherwise illegal activities should expire.

Senator BIDEN. I have other questions, but I will refrain. I have one last comment. The Senator pointed out, it is very difficult to define clandestine intelligence activities, the phrase used in the bill, and I would agree. I would think that the agencies that are required to uphold the laws of this country and protect us might not or need not be malicious in order to unintentionally abrogate some of our liberties, because I don't know how in the devil they are going to know what it means. I would think that if I were the head of one of those agencies, that it might put me in a position of taking unnecessary actions to make sure that I don't subject myself to criticisms of failure to act. So it really does have a potential for even nonmalicious abuse of some of our rights it seems.

Senator MONDALE. I couldn't agree with you more. You see, if you are the head of a bureau or if you are the head of the CIA or the NSA, I think you live in fear of not anticipating some question that the President or the higher-ups are going to ask you about. You want to be ready for everything, and if there are no restrictions, you will just find yourself naturally protecting yourself by investigating everything just in case you are asked, you will have the answer.

But that is not what law enforcement agencies are established to do. They are not established to spy on Americans in the legitimate role of an American citizen. That is what the Constitution was created to prevent. They are only supposed to investigate prohibited conduct, and not ideas.

Senator BIDEN. This was raised before, but I would like your opinion. Do you think that if, which has happened here, either an Arab or an Israeli Embassy contacted an influential person in the Jewish community in my State and said, "You know, we really need that appropriation before the Senate today, and it would be useful for you to pick up the phone and call your Senator, let him know how strongly you feel about that." Would that be sufficient cause for the intelligence agencies of this country to put a tap on my friend's phone in Wilmington, Del., because they talked with—

Senator MONDALE. Suppose somebody wanted to know how you were going to vote on an appropriation for the Middle East or an appropriation to help Italy and he is doing that at the request of some friends in that country, is that a person who, pursuant to the direction of a foreign power, is engaged in clandestine intelligence activities, who is knowingly aiding such a person?

Senator BIDEN. That is my question. I don't know.

Senator MONDALE. And the fact that the question has to be asked almost certainly means that somewhere, sooner or later they will get around to construing it that way.

I have never seen any authority conferred on a private intelligence agency that wasn't used to the fullest, and then when that wasn't enough, they went beyond it. And you have to understand, these are all fine people. They are doing things the way they feel it must be done to protect the Nation as they feel it must be protected, from dangers as they perceive them; but what happens is that pretty soon they exaggerate the dangers, and that comes out clearly in our report. We always had more official Communists than there were in private, and they become very pragmatic.

I asked Mr. Houston, or someone did at our committee—he is the one that shaped the classic document of official illegalities, the Huston plan, and that, on that committee were the representatives of every intelligence and law enforcement agency of the Federal Government. They unanimously voted for a plan, and Hoover dissented, which called for illegal activities.

Senator BIDEN. Hoover dissented?

Senator MONDALE. He later dissented for different reasons.

This called for opening mail, clearly illegal; it called for black bag jobs, clearly illegal; and a host of other illegal activities. And Mr. Huston was asked:

Was there any person who stated that the activity recommended, which you have previously identified as illegal, opening of mail and so forth, was there any single person who stated that such activities should not be done because it was unconstitutional?

Answer. No.

Was there any single person who said such activities should not be done because it was illegal?

Answer. No.

The man who headed the FBI's intelligence program on American citizens for 10 years said this:

Never once did I hear anybody, including myself, raise the question: Is this course of action which we have agreed upon legal, is it ethical or moral? We never gave any thought to this line of reasoning because we were just naturally pragmatic.

In other words, it is quite a thing to try to get ahold of this matter when the history demonstrates that that kind of attitude dominates.

Senator BAYH. I think the Senator's time is up.

Senator CASE?

Senator CASE. Thank you, Mr. Chairman.

First I want to say that it is a great privilege for me to be able to discuss this matter with such knowledgeable people as the Senator from Minnesota, and I mean this very sincerely. It is a privilege for all of us to be involved in this extraordinarily difficult and extraordinarily important activity.

On the question that concerns the Senator from Minnesota, suppose we said this, that the provisions of this chapter are intended to and shall apply to every acquisition of foreign intelligence information by means of electronic, and so forth, including any such acquisition claimed to be directed or authorized by the President in the exercise of any constitutional power.

Senator MONDALE. Can I respond to that in writing?

Senator CASE. Yes, Senator. I don't have any brief with the language. I want to know whether we should get into this or whether we should set it aside, or whether we should attempt to, as the bill comes from Judiciary, to put limits on it.

Senator MONDALE. Well, I think you have to deal with different parts of this differently. As far as I am concerned, foreign spies in this country should have no rights. Probably that is a little crudely put, but a KGB agent and so on—I shouldn't say it—I could care less how we proceed to get information from them or influence their behavior while they are in this country. What I am worried about is the application of these activities and their effect on American citizens. That is what I am talking about.

Senator CASE. I understand that, but the provisions of the bill do not apply to the surveillance of foreign citizens.

Senator MONDALE. Yes.

Senator CASE. So when I tried, in a rough, quick way, to present the questions, I was intending to eliminate all except those American citizens or foreign citizens, whatever the language is.

Senator MONDALE. I see your point there and I think it has some merit, but I would like to think about it and respond in writing if I may.

Senator CASE. Thank you, and I would appreciate it. I wish you would. That is all I have.

Senator BAYH. If there are no further questions, I will say on behalf of the subcommittee, Senator Mondale, we appreciate you and the members of your staff bringing to the subcommittee your expertise on this, and we hope you will stay in touch with us through these hearings.

Senator MONDALE. Thank you very much, Mr. Chairman.

Senator BAYH. Our next witness is Senator Tunney who has been very patient.

I might just make an observation to those that are present as well as the members of the committee, unless there are any serious objections, Senator Garn and I have concluded that because of the Republican Policy Committee luncheon and because of our inability to have access to this room beyond 1:30 p.m., and because we have yet to hear from the Justice Department, we have decided to ask Mr. Scalia to come back Thursday and be leadoff witness, because I think he is going to be a very important one, and it is going to be a very full day. Let me alert the members of the subcommittee to look at the witnesses that we already have scheduled, and then add Mr. Scalia. You can see we are going to have a very busy day Thursday, and it is going to be a very important day.

Excuse me, Senator Tunney. You have been very patient.

### TESTIMONY OF HON. JOHN V. TUNNEY, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator TUNNEY. Mr. Chairman, I have enjoyed the discussion, the colloquy with the other Senators. I would just like to read briefly my statement, which I hope is before you.

When the Senate Judiciary Committee approved S. 3197 two weeks ago, the vote was 11 to 1, and I was the lone opponent. A month before, I had sent the Attorney General 36 questions about the bill. I asked him to define vague terms. I asked him about the bill's loopholes. And I gave the Attorney General a series of examples of civil rights activities, and political dissent, and asked him if the bill authorized tapping their leaders. The Attorney General declined to answer my questions. I have sent a copy of those questions to this committee in the hope you will be able to get the answers.<sup>1</sup>

I am gratified that the Intelligence Committee has now decided that the bill does indeed require further study. I hope that these hearings will make clear that this is a dangerous bill and a threat to our civil liberties.

S. 3197 is a bill which authorizes buggings, wiretappings, and break-ins to install bugs. We already have a law on the books to authorize electronic surveillance for serious offenses, such as the crime of espionage. But foreign intelligence taps have been left to the President's inherent power, if he has such power. The bill's sponsors believe S. 3197 will bring us closer to the rule of law over foreign intelligence wiretaps. They feel that loopholes in the bill can be closed by staff report language. I do not question their good faith in feeling the bill to be a step forward, but I do not agree.

Several of the supporters of this bill are leaders in the fight against Senate bill 1. But, in my view, however, the provisions of S. 3197 far exceed S. 1. In my opinion there are 10 areas in which this bill's fine print spells out a threat to our liberties.

One, though this bill is called "The Foreign Intelligence Surveillance Act," this is not a bill restricted to counterespionage against foreign intelligence services. Nor does this bill even deal with our own spy activities abroad. This is a bill that authorizes our Government to spy in this country on American citizens as well as on foreign visitors,

<sup>1</sup> See p. 202.

including those who are breaking no law and who are engaged in purely lawful activity. Both the Church Committee and the 1976 Democratic National Platform drew a line ignored by this bill between electronic surveillance of crime and electronic surveillance of lawful activity.

Two, if any bill is to allow spying against lawful activity, it must be drafted with the utmost precision. But this bill is vaguest just at the key points. The Americans who are to be targets of the taps are called "agents of a foreign power." One criterion of the definition of agents includes people with no direct links with foreign countries, who are not acting at the direction of any foreign power, and who do not even know they are aiding a foreign power, but only know they are aiding someone who may turn out to be an agent. For example, someone driving an agent to an appointment could himself be deemed an agent. The other criterion of this far-reaching definition of agent is based on the term "clandestine intelligence activity". That phrase sounds sinister but it has no definition in existing law or in the bill. The Justice Department says it would include "covert political activity," and even gathering economic data or other information lawfully if the relationship with the foreign power is clandestine.

Three, the bill denies us the reality of impartial judicial review. Judges get to review only half the elements needed for the warrant. The other half of the elements are decided by a certificate from the FBI Director or some other Government official. Only one of seven hand-picked judges, deciding in secret, gets to hear a warrant application. Other Federal judges are denied jurisdiction, and the bill lets tapes of surveillance be used against an accused in a criminal trial without giving the accused an adequate right to challenge the legality of the bugging.

Four, in its sections authorizing spying against foreigners in this country, the bill includes friends and allies like Canada and Israel equally with our enemies. It includes countries where we have treaty obligations to treat their embassies as inviolable. The bill is not limited to foreign intelligence agents, but would equally cover professors at foreign state universities and civil servants. And, of course, a bug or tap would pick up all those Americans who talk with such foreigners, including political activists and members of Congress.

Five, news accounts in the last week have told how some FBI agents have in recent years continued to tap, bug, even to kidnap in violation of the law. This bill may be read as a backdoor charter for the FBI to continue its investigations of dissenting Americans who commit no crime. And the bill is not limited to the FBI. It would let the CIA or military intelligence conduct these taps against Americans, and so this bill could even serve as their charter, too, to spy on Americans in America.

Six, though it has 22 pages of details, this bill ends by continuing to leave us in doubt on the President's claim of inherent power to act outside the bill. The National Security Agency is left free to continue eavesdropping at will on our phone calls overseas. And, even though Americans keep their constitutional rights when they visit abroad, the bill does not protect them.



Seven, this bill would not give the Congress adequate information to assess whether there are abuses, or whether the program is worth the risk.

Eight, it was an evil of Nazi Germany that neighbor was forced to spy on neighbor. In our own McCarthyite period, friend was asked to report on friend. S. 3197 provides for ordering those who live together with a target, such as landlords and custodians, to cooperate in installing the microphones and tape records.

Nine, while we are still 8 years short of "1984", that book predicted that Big Brother would someday put TV cameras in our rooms to observe us. This bill, in a masterstroke of ambiguity, authorizes other surveillance devices to acquire information on its targets under circumstances in which they have a constitutionally protected right of privacy.

Ten, a clause buried in the conforming amendments lets the government eavesdrop on anyone's long distance calls for 90 days, without warrant, and without the Attorney General's approval, as long as they are doing it to test the equipment. The chief safeguard is that they burn the tapes as soon as they are done with them.

As Chairman of the Constitutional Rights Subcommittee of the Judiciary Committee, I am especially concerned with this bill's infringements on the right to privacy and other basic rights of Americans. To protect these rights, I believe that S. 3197 requires substantial amendments in each of the ten areas I have outlined for you this morning.

Senator BAYH. Senator Tunney, I think you more than any other member of the Judiciary Committee have focused on the shortcomings of this legislation, or at least those areas in which there is significant and legitimate difference of opinion.

You heard the call to the floor because of a vote right now. I wonder, because of that, if it might be just as well for all of us, if any questions we had we submitted to you in writing and put those in the record as well as asked you if you could remain available to us on a personal basis while we try to find the right answer to some of these questions.

I don't want to cut you short.

Senator TUNNEY. I think I would be happy to respond in writing to any questions that you have on the testimony that I have necessarily made some of my statements broadly without the specificity that ordinarily I would make if I had an hour or two to discuss it with the committee, but I would be happy to give more detailed information on the allegations that I made, but I think that all the allegations will stand the test of time and study.

Senator BAYH. Have you filed dissenting views or minority views to the Judiciary Committee report?

Senator TUNNEY. The majority views have not yet been filed, Mr. Chairman, and so when they are filed I will file my minority views with a greater degree of specificity. I will detail where I think the problems are, and it will comport with the statement that I made today.

Senator BAYH. I find our committee having difficulty where we are really being pressed for time in this session. We don't want to be dilatory, and will not be, yet this is a critical responsibility. Because of

the admitted vagueness of certain of the phrases and words that are used in this legislation, its principal sponsors have said, "Well, we will deal with that and we will clarify it in the report."

Senator TUNNEY. Impossible.

Senator BAYH. Well, even if it is possible, I think this committee is operating under a rather significant hardship because the report has not been forthcoming. You haven't had the chance to offer minority views, and we will just have to deal with that, recognizing that that is a critical part of our decision making.

Thank you for your contribution.

Senator TUNNEY. Thank you, Mr. Chairman.

Senator BAYH. We will be in session tomorrow morning. It will be executive session pursuant to previous notification.

[Whereupon, at 12:29 p.m., the subcommittee recessed subject to the call of the Chair.]

THURSDAY, JULY 1, 1976

U.S. SENATE,  
SUBCOMMITTEE ON INTELLIGENCE  
AND THE RIGHTS OF AMERICANS  
OF THE SELECT COMMITTEE ON INTELLIGENCE,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 1202, Dirksen Senate Office Building, Hon. Birch Bayh (chairman of the subcommittee) presiding.

Present: Senators Bayh, Garn, Inouye, Baker, Biden, Morgan, Case, and Thurmond.

Also present: William G. Miller, Staff Director; Michael Madigan, Minority Counsel.

Senator BAYH. We will convene our committee this morning. The other members are scattered and will be with us shortly.

Mr. Attorney General, we are grateful to see you, and that you could be with us to discuss the matter that you have already addressed yourself to before another committee of which I also happen to be a member. In addressing ourselves to the provisions of S. 3197, we recognize the delicacy involved in balancing the Government's needs to have access to the information necessary to protect itself from hostile acts, and thus secure the freedom of its citizens, on the one hand, against the need to protect the very freedoms of those citizens which make America worthwhile. We are particularly anxious to have your thoughts on the concerns that have been raised about the possibility that the bill goes too far in the latter area. I know from your reputation and my personal experience, having had an opportunity to observe you in the time you have been Attorney General, that you are sensitive to these problems. I think we have responsibilities as members of this committee and of Congress to understand, political life being what it is and human life being what it is, that Attorney General Levi is not always going to be the Attorney General. Indeed, as we have witnessed, there have been varying degrees of sensitivity to the rights of Americans in the White House, the Justice Department, and even Congress. As we move forward in this kind of legislation, we want to be certain that the kinds of protections and the kind of mandate and authority that is given will stand the test of those who may follow, who are arbitrary and capricious and not sensitive to the rights of American citizens.

I don't have anything further to say. I don't know if my distinguished ranking member, Senator Garn does?

Senator Baker?

All right, Mr. Attorney General.

**TESTIMONY OF HON. EDWARD H. LEVI, ATTORNEY GENERAL OF  
THE UNITED STATES; ACCOMPANIED BY DOUG MARVIN, SPECIAL  
ASSISTANT TO THE ATTORNEY GENERAL**

Attorney General LEVI. Mr. Chairman, Senator Garn, Senator Baker, I am pleased to be here today to testify in support of S. 3197, a bill that would authorize applications for court orders approving the use of electronic surveillance to obtain foreign intelligence information. I want to express, as I have in my previous testimony on the bill, the great significance which I believe the bill to have. As I am sure you know, the bill's provisions have evolved, from the initiative of the President, through bipartisan cooperation and through discussion between the executive branch and Members of Congress, in an effort to identify and serve the public interest. I want to say that this cooperation has been very generous. Enactment of the bill will, I believe, provide major assurance to the public that electronic surveillance will be used in the United States for foreign intelligence purposes pursuant to carefully drawn legislative standards and procedures. The bill insures accountability for official action. It compels the Executive to scrutinize such action at regular intervals. And it requires independent review at a critical point by a detached and neutral magistrate.

In providing statutory standards and procedures to govern the use of electronic surveillance for foreign intelligence purposes in this country and in establishing critical safeguards to protect individual rights, the bill also insures that the President will be able to obtain information essential to protection of the Nation against foreign threats. While guarding against abuses in the future, it succeeds, I trust, in avoiding the kind of over reaction against abuses of the past that focuses solely on these abuses, but is careless of other compelling interests. To go in that direction would bring a new instability and peril. In the area of foreign intelligence, the avoidance of such cycles of reaction is the special responsibility of this committee. I know you are deeply conscious of this responsibility; I know that you are aware that it demands the most dispassionate attention, the most scrupulous care.

I believe that I can best serve the committee's consideration of the bill by addressing certain concerns about its central provisions that I know have been expressed. At the outset, however, it may be useful for me to describe, in briefest form, the bill's design and purpose.

S. 3197 provides for the designation by the Chief Justice of seven district court judges, to whom the Attorney General, if he is authorized by the President to do so, may make application for an order approving electronic surveillance within the United States for foreign intelligence purposes. The judge may grant such an order only if he finds that there is probable cause to believe that the target of the surveillance is a foreign power or an agent of a foreign power, and if a Presidential appointee confirmed by the Senate has certified that the information sought is indeed foreign intelligence information that cannot feasibly be obtained by less intrusive techniques. Such surveillances may not continue longer than 90 days without securing renewed approval from the court. There is an emergency provision in the bill which is available in situations in which there is no possibil-

ity of preparing the necessary papers for the court's review in time to obtain the information sought in the surveillance. In such limited circumstances the Attorney General may authorize the use of electronic surveillance for a period of no more than 24 hours. The Attorney General would be required to notify a judge at the time of the authorization that such a decision has been made and to submit an application to the judge within 24 hours. Finally, the Attorney General must report annually both to the Congress and the Administrative Office of the U.S. Courts statistics on electronic surveillance pursuant to the bill's procedures.

As I said in my statement to the Senate and House Judiciary Subcommittees, the standards and procedures of the proposed bill are not a response to a presumed constitutional warrant requirement applicable to domestic surveillances conducted for foreign intelligence purposes. Two circuit courts have held that the Fourth Amendment's warrant requirement does not apply to this area; the Supreme Court in the *Keith* case, and the District of Columbia Circuit in its *Zweribon* decision, despite broad *dicta* among its several opinions, have specifically reserved the question. The bill responds then, not to constitutional necessity, but to the need for the branches of Government to work together to overcome the fragmentation of the present law among the areas of legislation, judicial decisions, and administrative action; and to achieve a coherence, stability and clarity in the law and practice that alone can assure necessary protection of the Nation's safety and of individual rights.

After 36 years in which succeeding Presidents have thought some use of this technique was essential, I believe the time has come when Congress and the Executive together can take much needed steps to give clarity and coherence to a great part of the law in this area, the part of the law that concerns domestic electronic surveillance of foreign powers and their agents for foreign intelligence purposes. To bring greater coherence to this field, one must of course build on the thoughts and experiences of the past, to give reasonable recognition, as the judicial decisions in general have done, to the confidentiality judgments and discretion that the President's constitutional responsibilities require; to give legislative form to the standards and procedures that experience suggests, and to provide added assurance by adapting a judicial warrant procedure to the unique characteristics of this area.

The standards and procedures contained in the bill, particularly its provision for prior judicial approval, draw upon the traditional criminal law enforcement search warrant model, the pattern followed in title III of the Omnibus Crime Control and Safe Streets Act of 1968. The bill's provisions necessarily reflect, however, the distinct national interest that foreign intelligence surveillances are intended to serve. The primary purpose of such surveillances is not to obtain evidence for criminal prosecution, although that may be the result in some cases. The purpose, instead, is to obtain information concerning the actions of foreign powers and their agents in this country—information that may often be critical to the protection of the Nation from foreign threats. But while the departures from the criminal law enforcement model reflect this distinct national interest, they are limited so that there are safeguards for individual rights which do not now exist in statutory form. The bill is based on a belief that it is possible to achieve

an accommodation that both protects individual rights and allows the obtaining of information necessary to the Nation's safety. As Justice Powell said in the *Keith* case:

Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.

The bill allows foreign intelligence surveillance only of persons where there is probable cause to believe are agents of a foreign power. Moreover, the agency must be of a particular kind, directly related to the kinds of foreign power activities in which the Government has a legitimate foreign intelligence interest. Thus, persons, not citizens or resident aliens, are deemed agents only if they are officers or employees of a foreign power. And the standard is much higher for a citizen or a resident alien. For the purpose of this bill, a citizen or resident alien can be found to be an agent only if there is probable cause to believe that the person is acting "pursuant to the direction of a foreign power," and "is engaged in clandestine intelligence activities, sabotage, or terrorist activities, or who conspires with, or knowingly aids or abets such a person engaging in such activities." Perhaps I should say to the Committee, and some of you know, an earlier draft of the bill was not phrased in terms of clandestine intelligence activities, but rather in terms of the somewhat simpler term "spying." Whatever phrase is used, in combination with the clause "pursuant to the direction of a foreign power" is intended to convey the requirement that there is probable cause to believe that the target of the surveillance is indeed a secret agent who operates as part of the foreign intelligence network of a foreign power. And it is at this crucial point that the judge must be satisfied before he gives permission for the surveillance.

I understand that there have been suggestions to the committee that electronic surveillance of citizens and permanent resident aliens should not be allowed absent a determination that such persons are violating Federal law. My own view is that the concept of "foreign agent" safely cannot be limited in this way. As I noted in a letter to Senator Kennedy, most of the activities that would, under the bill, allow surveillance of citizens and resident aliens, constitute Federal crimes; but other foreign agent activities, for example, foreign espionage to acquire technical data about industrial processes or knowledge about foreign personnel and facilities in this country, do not constitute Federal crimes. Yet information about the latter activities may be vital to the national interest, not because the activities are or should be criminal, but because they are undertaken clandestinely within the United States "pursuant to the direction of a foreign power," which is the standard employed in the bill.

The point is critical. I realize it has been suggested that Federal criminal statutes could be broadened sufficiently to reach all clandestine activities of foreign agents covered by the bill's standard. Of course, doing so would in no way limit the bill's reach. More important, any such effort would be based on a fundamental misconception. The purpose of criminalization, and of prosecution for crime, is to deter certain activities deemed contrary to the public interest. The purpose of foreign intelligence surveillances is, of course, to gain

information about the activities of foreign agents, not so much because those activities are dangerous in themselves—although they almost always are—but because they provide knowledge about the hostile actions and intentions and capabilities of foreign powers, knowledge vital to the safety of the Nation. Indeed, it may be the case, and has been the case on occasions in the past, that such knowledge, provided through monitoring foreign agent activities, is more vital to the Nation's safety than preventing or deterring the activities through criminal prosecutions. In short, the question, for purposes of properly limiting foreign intelligence surveillances, is not whether activities are such that knowledge of them, gained through carefully restricted and controlled means, is essential to protection from foreign threats. While the answers to these two questions have a high correlation, the correlation is by no means necessarily complete.

I know that a certain discomfort comes in departing from the criminal law model of allowing searches only to obtain evidence of a crime. But the probable cause and reasonableness standards of the fourth amendment are not measured exclusively by the interest in detecting and thus deterring violations of criminal law. Searches for purposes other than criminal law enforcement historically have been permissible, if reasonable in light of the circumstances and the governmental interest involved. Information concerning the activities of foreign agents engaged in intelligence, espionage or sabotage activities is a valid, indeed a vital, Government interest. I believe that the interest should be the proper standard of permissible surveillances under this legislation.

In addition to requiring that there be probable cause to believe that the subject of a proposed surveillance is an agent of a foreign power, the bill also provides that the Assistant to the President for National Security Affairs, or another appropriate Executive official appointed by the President and confirmed by the Senate, must certify to the court that the information sought and described in the application is foreign intelligence information. Such information is defined in the bill as:

Information deemed necessary to the ability of the United States to protect itself against actual or potential attack or other hostile acts of a foreign power or its agents; information with respect to foreign powers or territories, which because of its importance is deemed essential to the security or national defense of the nation or to the conduct of the foreign affairs of the United States;

Or—

\* \* \* information deemed necessary to the ability of the United States to protect the national security against foreign intelligence activities.

I understand it has been suggested to the Committee that the court, in passing on applications for electronic surveillances, should be required to determine whether the information sought is foreign intelligence information as defined in the bill, rather than accepting the certification to that effect by a high Presidential appointee with national security responsibilities. I think the definition of "foreign intelligence information" contained in the bill itself indicates why this proposal would be unwise. The determination of whether information is or is not foreign intelligence information necessarily will require the exercise of judgment as to degree of importance and need,

judgment, that must be informed by the most precise knowledge of national defense and foreign relations problems, and an accurate perception of legitimate national security needs.

Unless judges are to be given a continuing responsibility of an executive type with constant access to the range of information necessary, under the proposal, to deal intelligently with the questions they would face, I doubt that the courts generally would be willing to substitute their judgments for those which the Executive already has made. Of course, if mistakes are made, the costs could be incalculable. It must be noted in this connection that, in major part, it was precisely the felt incapacity of the courts to make judgments of this sort, and recognition that responsibility for such judgments properly resides in the Executive, that led the fifth circuit in *Brown* and the third circuit in *Butenko* to conclude that the fourth amendment imposes no warrant requirement whatsoever in this area. Indeed, the proposal could work a result quite the reverse of what its proponents would want. There would be a certain ease in proposing surveillance if the responsibility for determining its need lay ultimately with the court.

The point cannot be stressed too strongly. As it now stands, the bill places the responsibility for determining need where it belongs—in those officials who have the knowledge, experience, and responsibility to make the judgment, and who have been nominated by the President and confirmed by the Senate to aid in carrying out his constitutional duty to protect the Nation against foreign threats. With such responsibility clearly placed, there comes, in the long term at least, accountability—to the President, of course, but ultimately to the Congress, and to the people. I believe that this protection provided by clearly focused responsibility, when coupled with the probable cause requirement of the bill, a requirement that demands a kind of judgment the courts can responsibly make, insures responsible and certain barriers to abuse.

Finally, I want to express my understanding of the bill's section 2528, which deals with the reservation of Presidential power: The bill's definition of electronic surveillance limits its scope, to gain foreign intelligence information when the target is a foreign power or its agents, to interceptions within the United States. The bill does not purport to cover interceptions of all international communications where, for example, the interception would be accomplished outside of the United States; or, to take another example, a radio transmission does not have both the sender and all intended recipients within the United States.

Interception of international communications, beyond those covered in the bill, involves special problems and special circumstances that do not fit the analysis and system this bill would impose. This is not to say that the development of legislative safeguards in the international communications area is impossible. But I know it will be extremely difficult and will involve different considerations. I believe it will be unfortunate, therefore, to delay the creation of safeguards in the area with which this bill deals until the attempt is made to cover what is essentially a different area with different problems. An additional reason for the reservation of Presidential power is that, even in the area covered by the bill, it is conceivable that there may be unprecedented, unforeseen circumstances of the utmost danger not con-



templated in the legislation in which restrictions unintentionally would bring paralysis where all would regard action as imperative. The Presidential power provision, therefore, simply makes clear that the bill was not intended to affect Presidential powers in areas beyond its scope, including areas which, because of utmost danger, were not contemplated by Congress in its enactment.

In the reservation of Presidential power, where the circumstances are beyond the scope or events contemplated in the bill, the bill in no way expands or contracts, confirms or denies, the President's constitutional powers. As the Supreme Court said of section 2511(3) of Title III, "Congress simply left Presidential powers where it found them."

In conclusion, I want to emphasize the critical safeguards the bill would erect: Clear accountability for official action, scrutiny of the action by executive officials at regular intervals and prior, independent judgment, as provided, by a detached, neutral magistrate. I believe that the bill's enactment would be a significant accomplishment in the service of the liberty and security of our people.

Senator BAYH. Thank you, Mr. Attorney General. I am sure that all of us have a number of questions and concerns that we would like to express to help clarify just exactly what the meaning of the present language is and to see if there is some area of flexibility where we can accomplish the dual purpose of protecting the country and protecting the rights of individual citizens.

I want to emphasize before I address my questions to you, sir, and I assume my colleagues would share a somewhat similar concern, that the concerns we raise are not matters of personal concern that the degrees or standards that you might set or the President himself might set or any Member of Congress directly involved in the negotiation process might set. But we are truly responsible for establishing law in this area for the first time and, it seems to me, we need to profit from past experiences and understand that there have been those in high places that have not always had the delicate sensitivity of where the line should be drawn.

Now, we have asked our chief counsel if he might watch the clock for us, because we have a propensity to ramble here, and we want to limit it to a 10-minute rule.

One of the matters that has been expressed repeatedly and was expressed quite eloquently yesterday in executive session by our full committee chairman, Senator Inouye, and expressed earlier in the previous day's session by several of us, is the impact on American citizens who might be involved in exercising what most of us feel would be their constitutional right to participate in political processes and to influence the course of this Government. Before an American citizen can be subject to surveillance, the present language correctly refers to the need to prove that the individual is operating pursuant to the direction of a foreign power. Now, what does it mean, in your judgment, when we say, "pursuant to the direction of a foreign power?" Are we talking about a principal-agent relationship where the principal has control over the agent, or just what sort of standard are we directing ourselves to?

Attorney General LEVI. I tried to suggest in my testimony this morning that what is involved is the American citizen or resident

alien would have to be a secret agent acting at or pursuant to the direction of a foreign power as part of that foreign power's espionage network, intelligence, foreign intelligence network, so that it is a question then of his being really a part of a foreign government's directed activities to gain foreign intelligence.

Senator BAYH. Would it be conceivable then, and I certainly note your testimony, but is it conceivable that a citizen in this country could be trying to accomplish a certain goal, an ethnic citizen, let us say. There are several critical problems existing in the world today, in which the ethnic citizens that live in this country as American citizens, having rights as citizens, might feel that what should be accomplished in another part of the world that directly relates to their relatives and their "old country" is different than the policy which is presently being pursued by this country.

Does the agent, it is broader than that, we're talking about someone who knowingly aids or abets an agent, must this citizen be directly under their control? Could the person do it voluntarily and thus be similarly covered? The knowingly aids and abets provision as it impacts on the bill—does that mean that the citizen for whom surveillance is sought must know that he or she is part of this other nation's network that you described?

Attorney General LEVI. Yes. My answer is yes. I don't think it would be impossible that that would help to set forth language that would indicate the kinds of things that ought to be guarded against. This is not intended, it would not interfere with first amendment rights of any kind. As I say, it is a narrow area where I do not think that it would be desirable for the United States Government to say to foreign espionage agents that if you wish to escape detection of what you are doing, the thing to do is to hire an American citizen or a resident alien to do it for you, and they then cannot be watched this way. It is really that limited area, and it is exactly at that point where the protection of the bill is its greatest strength, because that is exactly where the court has to find probable cause.

Senator BAYH. Well, if we could come up with some language in this area I think you would ease a lot of people's concerns, because we're not only talking about the principal-agent relationship here, whoever it is who knowingly aids and abets such agent, but we're talking about a kind of activity which really could be interpreted rather broadly when we're talking about clandestine activity. Could you tell us just exactly what you envision, if indeed you can help be a bit more specific as far as clandestine intelligence activities.

Attorney General LEVI. I'm not sure I can draft it perfectly off the top of my head, but I am trying to say what is involved here is the knowing, directed participation of an American citizen or a resident alien engaging in secret intelligence activities, sabotage or terrorist activities at the direction and really as a part of a foreign intelligence network. So that, in all but name, he is really an official intelligence officer for the foreign government.

Senator BAYH. One, he must know he is part of that network. You mentioned the hiring. Must he be hired to participate in that?

Attorney General LEVI. Well, whether he is hired or whether he is compelled to do it because of some pressure, blackmailing pressure of some kind or other, and one can think of a number of different

circumstances, but the fact is, he knows what he is doing, he knows he is doing it for a foreign power, he knows what he is doing has to be kept secret, and he knows it involves foreign intelligence activities, and that he is doing it at the direction of a foreign power.

Senator BAYH. I had the opportunity to address a rally about a month ago and the chairman spoke quite eloquently about this in the Middle East situation, where we had a number of citizens in the Greek-Turkish-Cypriot or Cyprus problem, where we had large ethnic groups that were directly concerned about the impact that our policy has on their relatives in their "old country," and they might not believe that this is a kind of conspiracy thing that most of us would associate with intelligence activity, but I addressed a rally in New York City, right across from the United Nations, in which some 200,000 I was advised, filled up the park and the avenues going each way with a massive rally, directly related to the problem of the Soviet Union, and that of course has a direct relationship to our relationship to the Soviet Union and a direct relationship to SALT talks, to trade relationships, indeed legislation that very recently has passed in which the trade relationship was tied to the domestic policy in Soviet Union.

Now it is conceivable to me that a person who, for reasons that seem to be very legitimate to him or her concerning the kind of oppression that was directed at citizens that existed in the Soviet Union might get involved in activities that would come under this bill.

Attorney General LEVI. Is that a question?

Senator BAYH. That is a question.

At least, if a person participates in establishing a rally of this kind for the direct purpose of causing pressure to be brought to bear on Congress or to change the policy of this country and it is part of another country's foreign policy, and the person who approached the American citizen to participate in either the structuring of the rally or maybe breaking it up and causing violence to break out so that the original thrust of the rally would be thwarted, must that person know, again, must that person know that he or she is dealing with an agent, must he or she know what the end result of that rally might be?

Attorney General LEVI. Well, I think the answer is "Yes," under this bill. As a matter of fact, perhaps I said something which suggested that it was just dealing with an agent. I wouldn't accept that. A person would have to be an agent and would have to be doing it secretly or engaging in sabotage or terrorist activity for a foreign power. The illustrations shade off obviously other problems. I can imagine it is conceivable that someone so disturbed by a view of foreign problems might willingly wish to enlist in the service of a foreign government to cause terrorist activity, but I take it that is not the kind of situation which you are attacking.

Senator BAYH. Well, my time has expired, but you said you would be willing to deal with language that would deal with the definition of where the first amendment—

Attorney General LEVI. Well, I think one has to, but I think that here is an area that because of the past abuses, which really are quite outside the attention of this legislation, it would be most unfortu-

nate not to be able to go ahead with legislation which protects individual rights. The fact of the matter is that there has been no legislation covering this matter, I said for 36 years—it's really longer than that—and I am trying very hard to see if one can't put in place a kind of protection for individuals and to turn the restrictions of the bill, which require that a judge find that there is probable cause that this is indeed the kind of agency which makes one a proper target, because a person really is secretly acting as an agent for a foreign government, pursuant to the direction or he is otherwise engaging in sabotage or terrorist activity for that foreign government, to turn that on its head and say, "Well, that means that you can obliterate first-amendment rights," is to really suggest that the bill does quite the opposite of what it is intended to do. And, of course, it will leave us in the present situation where I have to say you are at the mercy of the executive branch without any legislation at all.

Senator BAYH. Again, this is not directed personally to what you say; it is just in the way of activities conducted under the guise of national security.

Senator GARN.

Senator GARN. Thank you.

I certainly agree with what you have just said. As you know, this is the third day of testimony, and I am a little bit puzzled by those who attack the bill where there is no statute, and where there is no protection now, and where the Executive can get into abuses that grossly violate the rights of American citizens. When we finally come up with a bill that I think is quite restrictive, only seven Federal judges with procedures that are necessary to go through, which assures the American citizen protections that do not now exist. I find it a little bit puzzling that people would oppose the whole bill. Certainly there are areas for disagreement. One of those that has come up several times in the last 2 days, is the broadness of "clandestine activities."

In the general sense what are your feelings and your understanding of that term? What does that mean and how broad is it? I mean, is this an area with loopholes or problems in it?

Attorney General LEVI. Well, I think it is better to distinguish the case where someone is openly acting for a foreign government, as for example under the Foreign Agents Registration Act; and where one, on the contrary, is doing it secretly, and is part, really, of the official network of a foreign government pursuant to its direction.

Senator GARN. You don't feel then those who say that it is a big loophole? You feel that there are other provisions in the bill that do not make it so?

Attorney General LEVI. Well, I do not criticize those who criticize the bill. I am just saying that I think that the protection is in the bill now, and it may be possible to list certain additional criteria to state and underline and emphasize that maybe then settle—

Senator GARN. There is another area that I have also been concerned about the last 2 days, and that is the area of oversight or reporting. The sole purpose of this subcommittee and the entire committee is to attempt to set guidelines, rules, and regulations under which the intelligence activities of this country will work so that we do not have the abuses that we heard about from the Church committee.

It seems to me that just a statistical reporting to this committee or to the Congress of how many wiretaps have taken place is not very meaningful as far as oversight and thus determining whether it is a proper activity or not. Would you feel that it would help strengthen the bill or possibly cover some of these areas that people feel are general if we had some substantive reporting requirements back to this committee? We are dealing with the most sensitive information this country has, and if we could know more about the specific cases as they occur on a periodic basis rather than just a statistical number of cases. It seems to me to be rather meaningless to say, "OK, we've conducted 67 wiretaps."

How do you feel about strengthening the reporting requirement?

Attorney General LEVI. The bill really doesn't, it seems to me, to speak to the oversight functions of this committee. This committee has its oversight function, and it can get the complete information which you are talking about; but it would not get it in public. What the bill talks about is what is filed and will be public. One has to assume that the proper relationships of this very special committee and the Executive will be one where full and complete information will be given to the intelligence community. I don't think the bill should speak to that, because it seems to me that is a general matter that goes beyond the bill, and what the bill talks about is what is to be made public.

Senator GARN. Well, I would certainly agree with you that the information that I'm talking about should not be made public, or certainly the wiretap would be useless if it were disclosed at that point. There is the question whether under Senate Resolution 400, which is not a statute, it is a resolution, we would have the authority to seek the additional information that you are talking about. If we do, that will satisfy me. My question was, whether it should be spelled out more clearly in the bill giving us that authority in a nonpublic way to have access to that information.

Attorney General LEVI. Well, I would suggest that there may be traps in trying to draft that. I would assume that the committee would assert its right to the information, and I have no doubt that it would get it.

Senator CASE. Senator, would you yield?

Senator GARN. Yes, I would be happy to.

Senator CASE. If I might just pursue this point a little bit further, I think it would be justified to bring it out now.

Mr. Attorney General, you say on page 2 that the certification under which a judge is bound to rely is national security information that is sought and can't be obtained by normal surveillance, that certification should be made by a person appointed by the President and confirmed by the Senate. That is true with respect to everyone except the assistant for National Security Affairs, is it not? In fact, he is the first person named to make the certification.

Attorney General LEVI. I'm sorry, I really don't know the answer to that.

Senator CASE. Well, I am informed that the assistant for National Security Affairs is not subject to Senate confirmation.

Attorney General LEVI. Well, our plan is to always have somebody subject to confirmation on the certification.

Senator CASE. Well, I'm not making this as a quibble. The guy who wrote the statement for you missed that point, and if it has a—

Attorney General LEVI. Well, since it includes me, I do worry about it.

Senator CASE. Well, if you are trying to tell us that we don't have to worry, because we have to confirm the fellow who makes the certification, then why did you mention it in the statement?

Attorney General LEVI. Well, I mentioned it for a different reason, because I really don't think one wants to put the court—it seems to me the question has never really been that you shouldn't have the certification. One requires the certification, I require the certification. Under the procedures under which I now operate, under the authority from the President, I require that kind of certification. But it would seem to me the problem is whether in addition one would have a judge make his own determination. That really puts, it seems to me, a judge in a very strange place, where he is second-guessing either Cabinet officers or—

Senator CASE. Mr. Attorney General, I am not discussing that. We all understand that the judge is in no position to make that determination himself. My point goes to what Senator Garn was talking about, the question of whether we have an effective review, and that is the reason I raised the point at this time. I apologize to the committee for breaking in but it raises the question of whether a person with executive privilege, a person beyond our reach, who's going to make the certification, is beyond review by this committee.

What I'm talking about are individual cases, and that is the reason I've raised the point about your statement, because as we conceive it, someone we confirm we can question on his own determinations, not his conversations with the President, but his own determinations, as to matters of this kind. I think that this committee, if it asserts it, has the right to review individual cases and the certifications in individual cases and to question the person who makes them, other than perhaps an assistant to the President. I would like to have your view about this as to whether we may not have the right to question individual cases under the statute. And I would make this point, I make the point that this determination is not made by the President in individual cases. It is made by another person; the President has nothing to do with individual cases. That is correct, isn't it?

Attorney General LEVI. That would normally be correct, yes.

Senator CASE. So this is not a Presidential determination to be made in an individual case; it's a determination by an officer set up under the statute. Presidential authority to deal with wiretaps, that's entirely by itself. This bill does not reach any wiretap authorized by the President in the exercise of any authority he may have under his general powers. I think we all have to recognize that this is a limitation of the power of the people, and that is correct too, isn't it?

Attorney General LEVI. No, I really don't think that is correct. I think that where this bill provides a procedure which the President can find, I think, and I have testified to this in other places, this bill is preemptive.

Senator CASE. You mean it preempts the President?

Attorney General LEVI. I think it preempts a great deal of the Presidential power.

Senator CASE. Where doesn't it preempt?

Attorney General LEVI. Well, to the extent that it provides a procedure whereby the foreign intelligence information can be obtained, as is covered in this legislation, I do not think that the President can determine that he is not going to use this legislation, as to go in some other direction.

So I do not think it is a case of saying there is Presidential power or no Presidential power. I think there is a case where there is Presidential power of a middle ground where once the Congress has enacted to provide a procedure which is a reasonable and usable procedure, then the President is limited where that now is covered by legislation.

Senator CASE. Well, I am sorry, I must get away, and I am intruding already, but could you answer those questions I asked before? Has the committee the authority, without regard to executive privilege or any possibility of being blocked by executive privilege, to acquire the information as to justification in individual cases by the person who makes the certification?

Attorney General LEVI. Well, it's a difficult question, because if there is executive privilege, if there truly is executive privilege, it cannot be changed by legislation.

Senator CASE. But what is executive privilege?

Attorney General LEVI. Executive privilege would be those matters relating to the special prerogatives of the President—

Senator CASE. But he's not involved in an individual case.

Attorney General LEVI. But he is involved in the sense that he has to assume—in the first place, he has to give the authority, otherwise the bill doesn't operate at all.

Senator CASE. A general authority, not a particular one.

Attorney General LEVI. He has to give a general authority. The underlying justification may well involve actions by Presidential groups so close to the President that it would be appropriate, although the claim is not frequently made, that it would be appropriate in some cases to claim executive privilege. And if that is true, the legislation would make no difference, if that is a good claim. But in normal course, certainly this committee, a special committee with special safeguards, certainly would get the information.

What I was trying to suggest was that an attempt to draft a provision of the bill to deal with that would be extremely difficult, and I would think that it would be like trying to draft a bill that would spell out all the powers of this committee, which I think one finds certain difficulties with, too.

But as an ongoing operational matter I have no doubt that this committee will get information. Now, there may be some particular cases where the committee itself, having gone a certain distance in depth into the background information, might decide that it did not wish to be burdened with additional information which sometimes is so fraught with security problems that I think would have to be worked out.

Senator CASE. I fully agree. I am only concerned that we shouldn't give an impression that this bill is broader than it is in the protection of individual rights in this area. That is all I am talking about now.

I am sorry, Mr. Chairman, and I apologize to all of you.

Senator BAYH. The Senator from Hawaii.

We are operating under time constraints. There is a vote, Mr. Attorney General. If I might suggest to my colleagues that perhaps those who are not in the immediate line of fire as far as questions are concerned, might want to go ahead and vote.

Senator INOUE. Thank you.

Mr. Attorney General, subject to the provisions of this bill, an appropriate Federal judge may grant an order approving electronic surveillance of an agent of a foreign power for the purposes of obtaining foreign intelligence information. According to definitions an agent of a foreign power could mean the Ambassador of Israel. Foreign intelligence information, according to the definition, means information with respect to foreign powers or territories, which because of its importance is deemed essential to the conduct of the foreign affairs of the United States. I would try to pose a question which is not hypothetical.

Not too long ago the United States was very deeply involved with Israel and with Egypt in resolving the Sinai problem. If, at that moment, the Ambassador of Israel called upon a citizen of the United States, say the President of the Cincinnati Bonds for Israel Committee, and told this president it would be most helpful if you would contact this Senator and advise him that supporting this appropriation will make it easier for Israel to enter into this negotiation because it would give us a position of strength. So this president who now has received a request from the Ambassador, calls upon a U.S. Senator and he is discussing information relating to the conduct of foreign affairs of the United States, because the President of the United States and the Secretary of State would like to know the position of Israel if given certain appropriations. Would that citizen and that U.S. Senator be subject to the provisions of the law and may be made the subject of surveillance?

Attorney General LEVI. Certainly not on the facts as you stated them. I don't know what is clandestine about them. I don't see how it could possibly apply.

Senator INOUE. But it meets your definition, doesn't it?

Attorney General LEVI. No, I don't think so, because I do not understand that the person who was talked to by the Israeli Ambassador is engaged in clandestine intelligence activities. I don't understand what it is, he would be doing which would make him part of the, as I described it before, the intelligence network of Israel, because there is nothing secret about it as you described it.

Senator INOUE. Well, let's change the scenario slightly. This time the Ambassador calls a U.S. Senator and tells the Senator, he says, Mr. Senator, very privately, it would be very helpful to the State of Israel if this appropriation was approved, because it would provide us with a position of strength in our negotiation with Egypt. Would that conversation be subject to a wiretap?

Attorney General LEVI. Well, that may be a little harder to answer than appears.

Senator BAKER. Mr. Attorney General, could you yield for just a second, because we are both going to have to leave. Let me ask just one clarifying point before you answer. The first question Senator Inoue gave you was in category 2; that is, an American citizen or resident alien involved in clandestine activity. The second question he gave you was in category 1.



Attorney General LEVI. That's why I said it's hard to answer, because I don't know who's the target of the wiretap. I don't know whether we're talking about the foreign agent or the Senator. Certainly the Senator is not going to be the subject of a wiretap.

Senator INOUE. The target might be the Ambassador?

Attorney General LEVI. Yes.

Senator INOUE. But the conversation the Ambassador has with the Senator would be retained?

Attorney General LEVI. This is assuming the tap is on the foreign power or its agent. Under the *Keith* case, if someone talks to the Ambassador where there is this tap, there can be, obviously, an over-hearing. The bill does provide for minimization procedures so if a conversation is not appropriately foreign intelligence information, it would be thrown away.

Senator INOUE. Would the information related to negotiations on the Sinai be considered as essential to the foreign relations of the United States?

Attorney General LEVI. Well, I can imagine cases where it would be and I can imagine cases where it would not be. I would think at times, speaking theoretically, now, that the situation in the Middle East might be of the utmost concern in the case of the world and the safety of the United States.

Senator INOUE. So there is a possibility that under those circumstances, a conversation initiated by, say, a Senator, to an Ambassador, would be subject to a tap?

Attorney General LEVI. Would be subject to a—pardon me?

Senator INOUE. To a surveillance.

Attorney General LEVI. Well, if the surveillance, and again speaking theoretically, is appropriately on the foreign agent, there can be incidental overhearings, and of course, that is true under Title III itself. It is true with anybody. But if it is not truly foreign intelligence information and the court has to approve the minimization procedures, then it should be thrown away.

Senator INOUE. Thank you, very much.

Senator Biden.

[Senator Inoue leaves the hearing room.]

Senator BIDEN. I guess I'm chairman, Mr. Attorney General.

Mr. Attorney General, I apologize if I repeat questions that have already been asked. I don't know whether they have been asked in my absence.

One recurring theme that you've obviously picked up in your testimony before the Judiciary Committee and your testimony here this morning is the overriding concern of all of us that legitimate political activity will become subject to surveillance, and the potential for abuse of the surveillance could take on proportions like those we witnessed in the last decade or so.

Attorney General LEVI. Thirty-six years.

Senator BIDEN. Well, a long time.

I didn't mean that as a partisan comment. You need not be so defensive.

Attorney General LEVI. I don't know why I'd be defensive.

Senator BIDEN. I'm not sure, but you were.

The point is that I am not sure and I don't know whether anyone else is sure of what constitutes this concept of "agency" in the bill.

You have gone at great length to your credit to point out that you felt it must be something very akin to what would be referred to in the vernacular as a spy, someone who was knowingly operating for the purpose of subverting America's interests with another power.

But you, in response to several questions said, appropriately so, you used the phrase, "Well, I could imagine," and then you went on to give your answer, and that is what concerns me. Whoever has the power to make these decisions is going to be able to imagine, under the law, different interpretations of this law and this statute. Now, you've been given specific examples, and I'd like to draw one for you if I may and see how you think this law would or would not apply.

A very zealous defender of the Nation-State of Israel is living in my State, a wealthy individual who travels to Israel four or five times a year. Under those circumstances, he meets with high ranking members of the Israeli Government. It's not very hard to do if you're willing to dedicate a forest you may be able to sit down with the Prime Minister for some little bit of time. And he sits down on a regular basis, from the Israeli side, maybe only because he's a major contributor, but from the standpoint of my constituent, he feels that he's on the inside of the decisionmaking of the Israeli Government. This constituent is told, "You know, your Senator," or so-and-so that you know, "is sort of shaky on the upcoming appropriations bill, and we very badly need these Hawk missiles," or whatever else, any specific item, I'm trying to be as specific as I can, "We need x number of Hawk missiles and we know that he's shaky on voting the money for those missiles for us. We'd like to have you do what you can do." Obviously my constituent or that person doesn't go back and contact his Senator and/or Representative and say I was told to do such and such. He comes back and starts to make an argument as to why Israel needs so many of these things, and then eventually gets around to the Hawk missile. Now, the State Department may have made a determination, which they have in the past, that Israel getting these Hawk missiles would have a destabilizing effect in the Middle East and be injurious to our national interest.

In that instance, the constituent of mine who visits Israel and comes back and contacts as many people as he can within the Government here, to find out whether or not there is a disposition in the lower echelons of the State Department to suggest that the Hawk missile be sold. He contacts my staff members, takes them to lunch if he can and says what is your boss thinking about this. He contacts as many as he can in order to push the proposition that Hawk missiles be sold or given to Israel and does it without letting anyone know the specific direction and request that came from a member of the Israeli Government saying why don't you see what you can do for us about getting this military appropriation.

Under this law, would that person be subjected to or capable of being subjected to electronic surveillance by the U.S. Government?

Attorney General LEVI. Well, from the illustration that you've given, just from those facts, I would not think that he would be or could be.

Senator BIDEN. Why not?

Attorney General LEVI. Because I don't think he is part—as I guess I said before you came, he is not really a part of the foreign

intelligence network of that foreign country. That's really what I was trying to suggest. What was meant by the person who was engaged in clandestine activity, sabotage and terrorist activities pursuant to the direction of a foreign power.

Senator BIDEN. I didn't say that.

Attorney General LEVI. Well, before you came, Senator, I said it might be possible to—well, I don't think one can do it just by defining, to list certain considerations which would have to be taken into account on both sides so as to alleviate this fear that somehow the democratic processes in the United States will be somehow impinged upon by an awkward use of the definition. It is certainly not intended to cover the kind of relationship which you have just pictured.

Senator BIDEN. I truly believe that neither you nor Senator Kennedy nor the administration nor anyone intends it for that purpose. But my problem is that the language of the legislation doesn't say or even imply, in my opinion, that he or she need be part of any network, and the definition of clandestine, out of the dictionary says, "concealed, usually for some secret or illicit purpose, but not necessarily so." "Concealed."

Attorney General LEVI. Well, Senator, we are dealing with a very difficult drafting matter. As I said in my testimony, originally the language said "spy" which seemed to some of us who drafted this a rather simpler way of conveying what was intended. That was rejected in the consultations which we had which were long and helpful with various Senators and their staffs, and then "clandestine intelligence activities" came. The language about "conspiring" and "knowingly aiding and abetting," was added, I should say, by the staffs of the various Senators. So, there has been a give and take here, an attempt to get the language on a narrow channel. Now I don't—I think, in view of the fears that have been expressed, as I've said before, it should be possible—you can't do it perfectly, but it should be possible to state certain criteria which would have to be taken into account, and that might alleviate some of these fears and give added protection.

I do want to say, though, there may be more—even so, there is more protection than I think you are suggesting, because the Attorney General has to approve this, the documents are all there, they will be available for this committee, and so that one is certainly going to have every reason for accountability and for wishing to be extremely careful as we have been. I have frequently announced at particular times in terms of the coverage of this bill that no American citizen is the target of a surveillance. I have been warned not to say that by some of my academic friends who have pointed out that that can't always be true, and therefore I shouldn't get involved in that. I've been trying to alleviate this fear, and maybe the bill can have added language which will cut away the kind of points that I think you are properly making.

Senator BIDEN. I really appreciate your saying that. I hope that can be done, and I look forward to that, because I would like to see legislation in this area.

In the example I gave, by the way, there is no question that from our fictitious friend from Delaware would be aiding and abetting a foreign agent as stated in the bill, the foreign agent being the country, they want the missiles, so he would be aiding and abetting them in getting that.

Now, without beating that point to death—hopefully, something can be worked out.

I know my time has run, I don't know how much time I've got here. Maybe the second round, I know I've got a bundle of questions here, but on the question of accountability, which is constantly reinforced by those who support the bill, which is a significant number of people whom I respect a great deal, yourself included, and it pointed out that we have the Attorney General, of course, signs off on it, someone whom we can advise and consent to—well, my 10 minutes is up.

Senator BAYH. Why don't you go ahead and ask this question.

Senator BIDEN. Someone we advise and consent to within the White House and the seven judges in the Federal courts, any one of seven judges in the Federal courts. And then you point out, no one is a target now. Well, I submit that probably the reason no one is a target now is the atmosphere today. We are very, very cautious today. You are, this committee is, the Congress is, the President is, we are all sort of walking on eggs because of what we just went through, and we are going to err on the side of protecting individual rights, I believe it's fine. I wasn't a part of it even though I, thank God, never had to experience it. I don't see this committee necessarily being able to protect individual rights over the long period. I didn't see a whole lot of Senators standing up during the McCarthy era saying, you charlatan and whipping into him. I can picture, God forbid, the confluence of several streams, a McCarthy in the Senate, a wave of anticommunism or something rolling through this country, an Attorney General with the ethics of Mr. Mitchell, and a President like Johnson and Nixon who didn't think a whole lot about invading people's privacy, and a law that's ambiguous, and that's what worries the heck out of me. It may be very premature, it may be something that is so outrageous that the confluence of those streams would never occur, but I plan on being here a long time, and the way I'm talking I may not be, and I may be on the other end of this law that I am going to have partial responsibility for at least having signed off on before I leave here. So the accountability really worries me a bit. Without that language being tight, I don't find any real solid solace over the long haul relying on the good will of men in those positions or women in those positions.

The one thing you pointed out in your testimony, was that the judges are not capable nor do they want to take on the responsibility of making foreign policy assessments, and the intelligence assessments as to whether or not this is needed or not needed. As a practical matter, what that means is that judges are going to sign off and allow these taps upon the assertion of the Attorney General and/or the White House staffer who asserts that it is needed. As a practical matter, the courts are not going to go into a great deal of detail. The history of the courts granting wiretaps has been one which if they have faith in and believe in the individual requesting the tap or the agency, there has been little, little background information reviewed by the courts, as a general rule.

So, again, my colleagues on this committee, especially some of my colleagues on the Republican side constantly point up to me that I have a great reverence for the courts, and why should somebody like me be preaching to them about the courts and be concerned that we have seven judges that are going to be signing off on it. The reason

I am concerned is the reason you pointed out, and that is, they are not equipped to do anything but sign off as a practical matter. That was a statement more than a question. You can respond, if you like, to anything that I said.

Attorney General LEVI. Well, I would like to add to this point, that when I originally began to work on this problem after I became Attorney General, I frequently made the point that I wasn't sure whether a warrant procedure was a good idea, because I really didn't know what the judges would do, and I did not want to weaken the accountability and responsibility of the people who would be actually deciding. But I think we have gone through a development here and what we have come up with is a bill which does have the judge decide the kind of thing. I think the judge can and will decide, namely the probable cause as to the agency relationship. And when you give this cases which it's going to be hard to handle by any definition, they are the cases which relate to that agency point, and that is exactly what the judge is going to have to decide. So at least, we have built in, it seems to me, some general protection.

Senator BIDEN. Thank you, and thank you for your attention.

Senator BAYH. Senator Morgan.

Senator MORGAN. Mr. Chairman, I just have one or two questions. I believe most of them have been asked of the Attorney General.

What would be your thoughts of the advisability of putting a 2-year limitation on this bill, so that we would of necessity have to review its provisions and see how it works at the end of 2 years?

Attorney General LEVI. Senator, I really don't know how I would react to that. I rather think the intelligence agencies would applaud the idea, and I am not sure that I have strong feelings about it one way or another.

Senator MORGAN. Well, I'm not sure I do, either, but it seems to offer a possibility of assuring a reevaluation.

Attorney General LEVI. What you have to be careful about is to make sure there wasn't any implication that after the bill expires that that is a congressional decision without a real determination that it wishes to, in effect pass, saying that there really shouldn't be any foreign intelligence surveillance. That would be an easy one to draft; I don't think it would speak the mind of the Congress, and I do think you could run into problems with Presidential authority.

Senator MORGAN. All right.

Nothing else, Mr. Chairman.

Senator BAYH. Mr. Attorney General, I think your testimony so far has been very helpful, certainly in trying to nail down some specific language in these troubling areas.

But did I understand you to say that if we were to now have existing the standards that you envision encompassed in the language of this bill, that no American citizen today is subject to electronic surveillance? Is that right?

Attorney General LEVI. There is no American citizen now the target of an electronic surveillance as would be covered by this legislation.

Senator BAYH. Let me ask you to give your attention to the sabotage and terrorism part of the definition. None of us are in favor of sabotage or terrorism. Is it fair to say that participating in sabotage or terrorism today is not in violation of Federal law?

Attorney General LEVI. Well, presumably it often would be and sometimes it would not be.

Senator BAYH. Can you tell me what you mean, generally or specifically, about sabotage or terrorism. Give me an example of where it is a violation of law and where it isn't. If it isn't, why shouldn't we make it a violation of law so we can then use the old probable cause standard?

Attorney General LEVI. Well, I don't want to argue that it wouldn't be possible to revise a Federal law to try to cover all the sabotage and terrorist activity, but I must say that I think to do that might get us into more serious civil liberties questions than this bill does. I think that is a separate problem, and one I am not sure—I'm not sure I'd be in favor of trying to make sure that all activities of that kind would be covered by Federal law. In other words, I don't see really how it changes the problems of the legislation itself.

Senator BAYH. Well, for some of us who are concerned about one of the general thrusts of this field, this bill now, by statute, permits the person to have their privacy violated without probable cause of crime, first being proven and a warrant obtained. That is where my concern lies, that we narrow the field where we can deal with sabotage and terrorism. Can you give me a couple of examples?

Attorney General LEVI. Well, I can give you one for example, an attack on the statehouse in Indiana of a terrorist kind or sabotage kind, pursuant to direction of a foreign power would be a violation of Federal law or not.

Senator BAYH. Why shouldn't it be?

Attorney General LEVI. Well, maybe it should be, but I'm saying it seems to me that is a different problem and I'm not sure you have to solve that problem in order to solve this one.

Senator BAYH. Well, I think more specifically we can come to the general agreement whether the statehouse in Indianapolis or city hall in Honolulu, whether that's illegal, it ought to be illegal, but give us examples of your concerns, a specific example or two, of the kind of activity that would fall under your definition of terrorism or sabotage that shouldn't be under.

Attorney General LEVI. Well, as I understand it, the question is whether one couldn't require that the sabotage or terrorist activities be illegal under some law, that is some State law or some Federal law, or through some conspiracy section, perhaps all of these could be squeezed under some Federal law. It does seem to me that is a different problem, and again the suggestion is that sabotage or terrorist activities as used in this bill are always which in some sense are illegal or criminal; I am not sure I would object to that. Again, I think there would be a drafting problem. I really don't see what—I really don't think that is—I don't think it is the illegality that is involved, because I have been down that track. You can have illegal acts which are very minor in the area of illegality, and would not rise to what I would regard as sabotage or terrorist activity.

I have sometimes been asked whether sit-ins would be encompassed under this and so on. So obviously that is not what this is talking about.

Senator BAYH. What about the kinds of demonstrations that existed in Chicago in 1968?

Attorney General LEVI. Certainly not.

Senator BAYH. Well, you see, what concerns me and I think some of the rest of us is that right now the language as it is, is very broad as far as what kind of acts are covered. This whole business of conducting the foreign policy, you expressed a willingness to help us tighten up that language.

Attorney General LEVI. Well, I think in some of the drafting, particularly that has been done by the American Law Institute and so on, one can set down a set of criteria that would not provide a perfect definition, that might help guide by indicating what is meant, and it has occurred to me that maybe that would help.

Senator BAYH. I think it would, I think it would. But it goes beyond, really. The reason I won't pursue this any further is because it goes beyond the immediate definition of who might be affected or what type of acts might be required to bring the given individual who isn't protected under the purview of this statute. But it also goes to the fact that we are establishing a standard here, a legislative standard which not only permits surveillance be logged for the collection of information which may be necessary for the protection of this country, but also permits information which is ostensibly collected for the purpose of foreign intelligence and foreign policy to be used subsequently for criminal prosecution without the probable cause standard which is now required—that a criminal act has been committed or is about to be committed.

Now, as one who has been very sensitive to civil liberties, doesn't that concern you at all?

Attorney General LEVI. You mean that what one finds is that as one engages in this surveillance of foreign intelligence information, one discovers that there is a passage of information, that the espionage has been violated, and a decision has been made to prosecute. I do not—I do not find it a great violation of civil liberties to use that information, and in any event, I would leave it to the courts to determine that issue, and leave it to the bill to set up such a framework.

Senator BAYH. The way I understand your response to earlier questions, in the normal process of reaching a determination in court criminal proceedings, the defendant and his attorney is permitted to contest the initial legality of the tap or use of surveillance. Under this statute, as it is now drafted, the way I understand it, and if you look at it differently I want to have your opinion, it is impossible for the defendant in a criminal trial to look behind or beyond the certification of the official who made certain certifications and allegations to the judge. That must be done *ex parte* and *in camera*.

Attorney General LEVI. That's right, and when the attempt is made to present the evidence, he can ask that it not be used and he can resolve the constitutional arguments he wishes to make. And if this is stepping on a constitutional right, which I don't think it is, a court is there to give him protection.

Senator BAYH. But under the statute, the court makes this determination *in camera*, *ex parte*, absent defendant, absent defendant lawyer, does he not?

Attorney General LEVI. Pardon me, I am having something said to me at the same time.

Go ahead, Senator.

Senator BAYH. Now, I think this is a key question here. The court may make this decision, but under the language of the bill, this decision is made *in camera*, *ex parte*, the defendant does not even need to be told of the tap if indeed certain criteria under the bill are met, by the judge's satisfaction, this cannot be contested. You cannot get behind the assertion of official acts, that these facts are, indeed, true.

And the Freedom of Information Act, for example, where classified documents are not permitted, that you are permitted to contest the legitimacy of the classification. It seems to me that is similar, whereas under this statute you are not permitted to contest the wisdom and the merit of the certification, once the certification is given, *per se*, that stands.

Attorney General LEVI. Well, Senator, what I was being shown I am sure you are aware of, on page 15 of section 2526 of the proposed bill, the court

May order disclosed to the person against whom the evidence is to be introduced the order and application, or portions thereof, only if it finds that such disclosure would substantially promote a more accurate determination of the legality of the surveillance and that such disclosure would not harm the national security.

Now, I think you have raised what I think is a genuine problem. What we have to do is balance a great many interests here. If the Government is going to be forced to disclose all background information and so on in connection with the certification, then it very likely will not proceed. Moreover, it would probably not bring the criminal case. What you then have, in fact, are in-depth foreign intelligence agents who it may be determined, quite properly, ought to be prosecuted, who will not be prosecuted.

So we are trying to balance these interests and I don't know the way of permitting that kind of prosecution, which I think often is important; that is, to permit it, and at the same time to say: "But this information or the fruits of the information ought to be disclosed and all background material given to the subject."

So that one is relying on the courts here. Now, that is, of course, the present law. So that we haven't changed the law in this respect.

Senator BAYH. Of course the present law requires the probable cause that a crime is to be committed, too, before electronic surveillance, subject to criminal—

Attorney General LEVI. No; that is not what the present law would say, if there is a use of this kind of surveillance, and it is proper and it is without warrant.

Senator BAYH. I have just been shown by staff that in a discussion of this matter in the House pursuant to a similar line of questioning, you are quoted as saying, "I think we can spell out a better section."

Attorney General LEVI. I thought we had. So what you are now saying is that we didn't do as well as we intended to do.

Senator BAYH. Well, I am still concerned about someone being subject to criminal prosecution without the present standards being met.

Senator GARN.

Senator GARN. I just have one brief question.



Under the certification of foreign intelligence information, it seems to me it is unclear what power or authority the judge has beyond that certification to see additional information rather than just the flat certification that foreign intelligence information is available. Can you give me your opinion as to how much more he can ask for?

Attorney General LEVI. Well, he really can't ask for a great deal. He can make sure that the certifications have been given and that they exist, that they are in order. But really what the judge is operating on, is as I said before, an agency point, not on whether the certification was well based. That he is not asked to determine. The judge can determine whether there are proper minimization procedures, he can determine the agency point. He must determine the probable cause on the agency point. He is not asked to make the determination that goes beyond finding that certification is available.

Senator GARN. I believe there is a section that requires the Government to furnish such other information or evidence as may be necessary.

Attorney General LEVI. I would interpret that as a requirement that basically with the agency—

Senator CASE. With respect to what?

Attorney General LEVI. With respect to the agency point.

Senator GARN. Also in section 2524, an application to obtain a description of the type of information, it is also unclear how much information is required by that provision.

Attorney General LEVI. I'm sorry, Senator?

Senator GARN. Section 2524(a)(6), requiring the application to the judge to contain a description of the type of information sought.

My point is, I believe it is unclear as to how much information is required by that provision, how much and what kind of information is necessary there.

Attorney General LEVI. Well, I assume to some extent it isn't clear, because it would tell the kind of thing that was involved, but it would not particularize or be specific, I was going to say the details or would not argue the question of importance.

Senator GARN. You feel it is deliberately unclear, then. It isn't just an oversight leaving a gray area.

Attorney General LEVI. No; I think that again, what we are working with is a balancing problem. I do not think—of course, I know that some judges would feel very comfortable doing this, but I do not think that it is a judicial function to determine whether the—to second guess the executive person who has determined foreign intelligence information which is essential. So that we think there should be a description of it, the judge should have an awareness of the kind of thing that is involved, but as to what is the specific information sought, that would not normally be given.

I can think of cases where some very specific information might be required, particularly where there is an emergency tap which the bill provides for, where one would wish to disclose that to the judge during the 24-hour period. But normally I don't think that is the kind of thing that would be disclosed, except in terms of type.

Senator GARN. Thank you.

Senator BAYH. Senator Inouye.

Senator INOUE. Mr. Attorney General, if I may continue with the line of questioning that I left off when I went to vote.

Your definition here of foreign power includes factions of a foreign government, so I presume that any one of the factions that were involved in the recent Angolan civil war would qualify. There were about three or four I believe; I can't name any, but I am certain you know what I am talking about.

Attorney General LEVI. Well, I think they would, because they were part of a foreign government, so I think they would.

Senator INOUE. Then the progress of the war there would be of essential interest to the United States in the conduct of its foreign policy.

Attorney General LEVI. Well, it either would or wouldn't, depending upon other determinations.

Senator INOUE. Would a mercenary, an American citizen who signs a contract to work for one of the factions as a mercenary, would he be a target of surveillance, or would he qualify?

Attorney General LEVI. Well, I don't know the answer to that, and I think one would have to think long and hard before making a determination on that. I think there's no problem about him acting pursuant to the direction of a foreign power, as you pointed out, and there would be no problem, presumably, although one would think that there would be, under some circumstances, no problem in stating that foreign intelligence information might be involved. I don't think the part that deals with sabotage and terrorist activities would be involved, but it is quite possible that he might be an appropriate subject, I think.

Senator INOUE. And the person, the American citizen who recruits the mercenary might be the subject of a surveillance, or would he qualify?

Attorney General LEVI. He might; he might. Of course, he's also violating the Federal law in any event, but that's a different matter. He might be. I find it a little hard to know why this would be important foreign intelligence information, but it might be.

Senator INOUE. An American citizen during the Yom Kippur war decides he wants to go to Israel to help the Israelis. Would he qualify?

Attorney General LEVI. I don't see how he could possibly qualify. That is really quite a different case than you gave before.

Senator INOUE. An American citizen who attends a rally and exhorts the young men there to fight under the flag of David, would he qualify as a target?

Attorney General LEVI. Well, I shouldn't think so, and as I tried to say before, we'll have to try to concoct some phrases, I suppose, so that that is not the kind of thing this bill is intended to be directed toward.

Senator INOUE. I'm certain of that, sir, but I just want to make certain that this bill would not make possible that this type be a target.

Now, may I ask another question relating to the process to minimize the acquisition and retention of information. What process do you have in mind? Would you describe for this committee the procedure or process that you would follow or present to the court to minimize the acquisition and retention?

Attorney General LEVI. Well, one would have to draft a set of procedures and rules which the court would approve. Where the incidental conversations do not have any foreign intelligence information or content, then they would have to be done away with. Or, if they involved privileged conversations between attorney and client and so on, so that one would have to draft such a set.

Senator INOUE. How can the court be assured that this procedure is being carried out?

Attorney General LEVI. Well, I don't know how the court can do it, other than through the certification, but of course I assume it would be contempt if the rules were violated, and I assume the court could gain assurances on it.

Senator INOUE. I ask this question because I have been advised that the Federal Bureau of Investigation compiles and retains in their files the raw data which oftentimes the agents themselves know are absolutely false, which they keep. There is no process to minimize the acquisition or retention of information.

Who would decide whether this information is one that comes within the purview of this bill?

Attorney General LEVI. Well, it would have to be under the direction of the intelligence officers who would have to be following the rules that were established and which the Attorney General found sufficient, otherwise he would not approve and which the court would have the right to determine if it was sufficient.

Senator INOUE. Is there any requirement in this bill for the Attorney General or any other public agent to submit to the court some sort of certification that this procedure to minimize has been carried out?

Attorney General LEVI. I don't think there is, but the court could easily require it; it could easily be asked. I would say that the requirement that the court be satisfied that the minimum procedures are sufficient is broad enough language to give the court license to require that kind of assurance and certification.

Senator INOUE. I realize that what I am about to say relates to activities of the past, and I am not suggesting that these activities occur on this occasion or hereafter, but we have been told in the press, that certain citizens of the United States have been subjects of wiretap surveillance and that the information acquired has been shared with the press and others.

Is there any assurance here that the nonessential information will not be shared with nonappropriate officials or citizens?

Attorney General LEVI. Well, of course, that is the purpose of the minimization procedures. Beyond that, what you are also discussing would be a great impropriety, and my belief is that the Privacy Act would be involved, so I think there is protection.

Senator INOUE. You have no procedure here that would make certain that this would not happen?

Attorney General LEVI. Well, the minimization procedures are really for that point. I think, Senator, you've raised a more general point about information which comes in and might be shared with other intelligence agencies. There is no absolute protection on that. The minimization procedures are really for that particular purpose.

Senator INOUE. Well, I am not talking about sharing with other intelligence agencies. I really should be a little more specific. Let's say that citizen A is talking to citizen B and citizen B fully qualifies to be a target, but in their conversation they discuss, among other things, the subject of sex, a very juicy item in the press today, which obviously does not get involved in foreign intelligence information. What I want to know, is there anything you can tell us that would assure citizen A and B that that type of information is not shared with people who are not authorized to receive such information?

Attorney General LEVI. Well, as I said before, I think the Privacy Act covers that. I want to check that, but I think it does. I don't think it can be distributed or illicitly shared. I think the Privacy Act itself was a step forward which I think was to prevent that kind of dissimulation which I agree with you is quite improper.

Senator INOUE. And that type of information would be destroyed?

Attorney General LEVI. Well, I don't know whether we're talking about the—if we're talking about the Federal Bureau of Investigation guidelines that we have created so far do provide for the weeding out of information and its destruction. There has been some question as to when it should be destroyed and how long it should be kept and so on, and we have taken steps in some particular cases to destroy it.

Senator INOUE. Thank you, Mr. Chairman.

Senator BAYH. Senator Case.

Senator CASE. Thank you, Mr. Chairman.

Now, the Attorney General has to approve applications on this.

Attorney General LEVI. Yes.

Senator CASE. That means, under the definition, the Attorney General, if he's not there, the Deputy Attorney General.

Attorney General LEVI. No, it means the Attorney General—yes, the Deputy if he is acting.

Senator CASE. That's what the law says. Now, does that mean what it says? Does that mean you personally have to look at all of these things and make the certification?

Attorney General LEVI. Yes, it does.

Senator CASE. You or your Deputy in your absence?

Attorney General LEVI. It certainly does mean that.

Senator CASE. And your responsibility would be satisfied by having your most trusted assistant giving you the papers and a stamp for your signature?

Attorney General LEVI. I would not think that was discharging my responsibility, no.

Senator CASE. That's quite clear?

Attorney General LEVI. Yes, sir.

Senator CASE. Now, in the exercise of that function, approving the application, are you obliged to determine, going behind the certification that the judge would get, that the information is essential to the conduct of foreign affairs? Would you have to make that determination? Would you be held to the responsibility for making it, or what?

Attorney General LEVI. I have to satisfy myself on that score. Of course, in doing it I do take into account the fact that I have received the certifications from other people more directly in charge of that area of intelligence or foreign policy or whatever, and I take that into

account. If I am not satisfied, I ask for more information, and sometimes I just disagree with them.

Senator CASE. On that very point, in the mere conclusion, in the certification that the information sought is essential for the conduct of foreign affairs, is not then binding on you?

Attorney General LEVI. I have not regarded it as completely binding on me, because I am instructed that I have to satisfy myself on that. But on the other hand, I do not think that—I mean, in doing that I take into account the certification I received, and if I don't understand it or I'm not satisfied, or it's a matter of deferring or making sure there's really a reason for doing this, that this is a deliberate decision and one that can be supported. If I think it cannot be, then I wouldn't do it.

Senator CASE. Well, this is my next question. Can you refuse, then?

Attorney General LEVI. Yes.

Senator CASE. You can refuse?

Attorney General LEVI. Yes, I have.

Senator CASE. And nobody can do anything about it except fire you? That is, the President.

Attorney General LEVI. Well, I suppose the President could not only fire me, but I suppose in fact he could take it out of my hands without——

Senator CASE. He what?

Attorney General LEVI. I suppose he could take it out of my hands without firing me——

Senator CASE. Where in the world would he put it?

Attorney General LEVI. Well, he could put it in his own, I suppose.

Senator CASE. Well, there's nothing in here about the President's——

Attorney General LEVI. Oh, you mean under the bill?

Senator CASE. Yes.

Attorney General LEVI. Well, I think under the bill the President would have to authorize the Attorney General and the Attorney General would have to be satisfied.

Senator CASE. And then if you refused? I'm sorry. This is right in front of me now.

The President could direct you to make the application contrary to your judgment announced and conveyed to him, that it was not proper.

Attorney General LEVI. No, I think under the bill the Attorney General would have to be satisfied. If he were not I agree with you, he would have to be fired. But I assume he might resign first.

Senator CASE. Assume what?

Attorney General LEVI. He might resign.

Senator CASE. Well, I'm not trying to suggest anything like that.

Senator BAYH. I hate to interrupt, but I think from the standpoint of continuity, if I could just ask the Senator to expand it a little bit to deal with a related question of the judge's ability to refuse. The way I understand the Attorney General, he does not believe that this is a matter where the judge should get involved. If you look specifically at the type of information to be sought, and the question of whether there is any other way in which the information can reasonably be obtained, in those areas the judge is bound by the certification.

Now, could I ask the Attorney General to at least give another thought to this. Surely the average judge isn't an intelligence expert, but the average judge is not competent to determine questions of sanity, mental illness, the average judge is not competent to judge a question of patent and some of the intricate questions. In those instances, if he has reason to believe that perhaps he should be—whatever his reasons, why don't we give him the opportunity of saying, OK, prove these two points. Don't just certify it. Show him why.

Attorney General LEVI. Well, Senator—

Senator BAYH. Excuse me, I don't know whether the Senator wants to broaden that question that way. If he doesn't, I'll broaden it.

Senator CASE. Well, I'm very much interested, but that of course gets to very broad matter. I'd like to deal with a couple of more technical things, if I may, and then I'll join you as long as you and I are able to stay here and the Attorney General will favor us with his presence in dealing with that, because it is a terribly important matter.

Now, you then, the Attorney General, are really at the center of the whole procedure, because I agree with most of the proponents of this bill, that the chief function that the bill will serve if it is adopted or enacted is to provide accountability. It will not substitute anybody else's judgment for the judgment that now exists, at least, I wouldn't think so; but it will lay out a record which people can perhaps later follow and determine whether abuses have occurred and therefore act as a strong deterrent against the commission of abuses.

These questions of mine are chiefly directed to that end. Now, what would you think of a provision in the law to this effect: to assure, as far as possible, that electronic surveillance does not occur except in accordance with the law, a provision that all electronic surveillance—we'll put it this way so we put clearly the Congress handle on it—nobody shall be paid a salary for participating in electronic surveillance other than through the procedures of this or the corresponding domestic legislation that is on the books, and unless a full report of all such surveillance is made to the Congress of the United States, the Speaker, and the President of the Senate, and presumably it would get to us here. What I am getting at is this, I am not trying to argue that the President has no other authority or that other agencies don't have any authority in certain circumstances, but I would like to get in one spot a sharpening up of this so-called responsibility or accountability proposition so that we would know if the President in the exercise of any other authority or any agency of this Government in the exercise of its authority engaged in electronic surveillance other than pursuant to the provisions of the two laws.

Attorney General LEVI. I would be opposed to that.

Senator CASE. I am sure you would, but why?

Attorney General LEVI. I don't know why you are sure. I am, but I'll tell you the reasons why I am opposed to it, because—

Senator CASE. Well, because you're a very articulate lawyer representing a client.

Attorney General LEVI. No, it's because—

Senator CASE. Oh, yes.

Attorney General LEVI. It's because of that area that is beyond this bill and outside it is a very complicated area which as I said before, I don't think one can cover by legislation—

Senator CASE. I'm not trying to cover by legislation in the sense that I'm trying to regulate it or prescribe it. I am just saying report it.

Attorney General LEVI. Well, even the reporting itself it seems to me would raise complications, and that ought to be looked at directly, and it is really not covered by this legislation. And an attempt to cover it in part by just saying that it can't be done without reporting it to Congress, and I don't know, then you'll have to figure out what kind of reporting to Congress and to which committees and in which committees and in which House. It seems to me it would raise enormously difficult problems.

Senator CASE. I don't think they are insuperable, Mr. Attorney General. We've had requirements in law, for instance in the Atomic Energy Act, that that committee, the Joint Committee, doesn't have to make inquiries as to what is going on. There is an affirmative duty to tell it of everything that is going on.

Attorney General LEVI. Well, Senator, I think it helps when you have a joint committee. But here there is not a joint committee.

Senator CASE. And no aspersions to the select group which you are talking to.

Attorney General LEVI. No, a compliment rather.

But there is a problem, and I really think that would load on this bill an attempt to do something else which might just very well torpedo the bill, and I realize that perhaps the world won't come to an end, but I rather think the bill would be an advance.

Second, as to matters where there were unforeseen, it does provide for reporting. The bill does provide for reporting.

Senator CASE. Well, that is not a very specific and particular kind of thing, but still within the confines of this kind of legislation, there's probably an unnecessary disclaimer of any attempt to invade the President's rights if he has any in this matter and you would be the first to say that he wouldn't negate the existence of any such rights nor would I. I am just talking about accountability, and to the power of Congress by legislation denying the paying of salary to individuals to prevent this kind of activity from going on, and with all possible and all necessary safeguards against unwarranted disclosures.

Attorney General LEVI. Well, it seems to me it's a large area, extremely complicated.

Senator CASE. I'll say it is, but the justification for this given to us by Senator Kennedy and Senator Mathias, both of whom are dedicated to the upholding of individual rights, is that this will produce a better situation than we have now. And you and they have agreed that you will go this far in advising the President to sign it. You will, won't you? Aren't you going to advise the President to pass this?

Attorney General LEVI. Oh, yes.

Senator CASE. Of course you are.

Attorney General LEVI. This is an administration issue.

Senator CASE. I think this is a very fine record, and I am just trying to probe whether it can be made even more useful.

Attorney General LEVI. Well, we did, Senator, on the other days when we worked on this, we tried to draft legislation which would go beyond the coverage of this bill, into other areas which are difficult to talk about; but we decided that the complications were such that we had better reserve that for a separate attempt, and that really does raise different kinds of problems. I think that is the point.

Senator CASE. The bill provides for certification of the court on the question of the essentiality of this information and the ability to get it by other feasible means. Would those certificates be documents? These proceedings, of course, at the time are in camera. Is there any provision in the bill, I forget now, for release of the record of the proceedings at any time?

Attorney General LEVI. Well, there isn't unless it is an emergency overbearing and the court has not approved or disapproves it, doesn't give approval.

Senator CASE. What would your judgment be as to what happens to the records of the court?

Attorney General LEVI. Well, I would hold that while the judge can inform the target, I would hope that he wouldn't. I don't know how, except for that this does not require the disclosure of the record. As I have said before, I would assume it does require a kind of statistical accounting which could be made public, but this committee would certainly have access to a considerable amount.

Senator CASE. What would you think to a requirement that is given to the court be regularly transmitted to the Congress, say this committee.

Attorney General LEVI. I think that would raise all kinds of difficult problems.

Senator CASE. Not because of the number of applications, because there are not expected to be many; is that right?

Attorney General LEVI. Well, now, when you say it is not expected that there be many, do you mean dealing with American citizens? I think there always is a problem when there is that kind of overhearing which may, I'll say frequently involves criminal activity which is being watched. I'm not sure there should be a revelation of the name of the person and that kind of material to a congressional committee, because it is somewhat like the disclosure of grand jury material to a Senate committee. I don't know whether the Senate committee will want it. What I believe is there will be ways of handling that so that the proper security committee can satisfy itself to the extent that it wants to.

Senator CASE. My time is up, Mr. Chairman. I just want to make this concluding observation. If I vote for the bill, in favor of reporting it, it is because it is an improvement in the matter of procedures and practices over the present situation. One of the chief importances of legislation of this kind I think is to reassure the average citizen that when a guy comes down the street and says "If you don't do so and so, I'll see that the FBI or the CIA or whatnot gets into this thing, you've got a record a mile long," et cetera, et cetera, then he'll go around worrying for the rest of his life whether there is something wrong. It isn't quite met by the current provisions of the Freedom of Information Act, and that is why I pressed rather strongly on that.

Senator BAYH. I would like to follow a line of questioning by the Senator on the reporting matter.

Frankly, I am under the opinion that under Senate Resolution 400 we have the authority now to request more than the statistical data and we are to provide meaningful oversight function, and not just try to lay here, not do anything substantive. To get to the meat of the question, why don't we, in this law, suggest that in addition to num-



bers we can, with the kind of sanitization, sterilization I think is a better word as far as the name is concerned, why don't we permit this kind of information to be given to the Congress so that we can actually look and make a judgment here and get the legislative process involved in making the determination about the merits of electronic surveillance.

Attorney General LEVI. Because as I said, I think there are two reasons. First, you have the power anyway, which I rather imagine you do. And whether you have it because of comity or beyond that I don't think is really important at that point. It isn't required in legislation because you'll have it anyway, and I don't suppose that this Committee is going to keep redefining its powers every time legislation gets passed so that it will be specified what it should receive. I would think that the proper relationship which is one which will be beneficial to both sides is a working relationship which would determine as events go by what the Committee requires so that it be properly informed. That is the first point.

The second one is, that I really do have to say that I am concerned, from a civil liberties standpoint, about, and I would hope that this would be handled by the Committee itself, I am concerned about revealing to congressional committees ongoing investigations which may be investigations of criminal conduct of American citizens. That seems to me to be a strange mixture which I am not sure protects the American citizen.

Senator BAYH. Let us strike the name of the citizen before the report comes to us. I don't want to know that.

Attorney General LEVI. Well, that is why we are trying to do it in terms of types and things of that sort so that we are trying to protect that kind of policy and probably and perhaps the maligning of a person. So I would be worried that it said that all of the information would automatically be available to the Committee. I would think that that is something the Committee in its proper oversight function could work out. It doesn't have to be legislation.

Senator BAYH. Well, first of all, I would think we could provide specific language that would deal with the protection of the right of individuals from having information about investigations being made available to us, and thus made available even contrary to Committee rules to others. Whether it is Mrs. Brown or Mr. Smith really isn't relevant to this Committee, but I think this Committee has this responsibility to protect the rights of American citizens, and not only does it give us a better understanding of whether there really is a need, yes, this does accomplish a purpose, this particular tap, this particular electronic surveillance gives a better understanding of the importance or lack of importance of a role.

I don't know how you'd be, but if I were Attorney General and if I knew that this kind of thing was going to be subject to scrutiny by Congress, I might be just a little more sensitive than I normally might be and make absolutely certain that there is the right test. As far as the comity versus legislation, this isn't just any old bill. This is the first time that we've really legislated in this area, and that is why I think reporting is important to be enunciated here.

Attorney General LEVI. Well, I just think the reporting provision may run into incredible problems, whereas you have your Committee,

the Committee has oversight functions, and I have no doubt it will get the information that it requires. I am not sure what is gained by putting it in the legislation. I think it will create great problems.

Senator BAYH. Well, I will tell you what it gains. When you get back to teaching or practicing law or whatever it is, and there is an Attorney General who does not share some of the interpretations you just expressed about our ability to get the law, we can say, "wait a minute, Mr. Attorney General, this is what the law says."

And here again I think we have to recognize what has been disclosed to us about the previous administrations. I don't feel at all times it has met the standards that you imply.

Well, let's see if we can't discuss this and work it out. I assume—and maybe this is an assumption that I shouldn't make—that in those areas where we have, at least you and Senator Kennedy and others have reached an agreement that certain reports ought to be made, that you have no objection that in addition to the Judiciary Committee, that those reports also be forwarded to this Committee.

Attorney General LEVI. No, obviously not at all, I welcome it.

Senator BAYH. Well, I just wanted to ask.

Let me ask, let me go back to this business of certification because I think it is a logical extension of his question.

Why do you believe that that matter of information to be sought, whether electronic surveillance is the only way to get it is a matter of sole discretion of somebody in the executive branch, that the judge is not competent in assessing that.

Attorney General LEVI. I think the question was whether he was competent, as you put it, to assess the foreign intelligence importance.

Senator BAYH. Yes.

Attorney General LEVI. Well, I don't, I really do not myself prefer the point that judges are incompetent in that respect because I think some judges are competent and perhaps some of them aren't. I really don't think that is the point. I think the point is that it really isn't, as far as I see it, an appropriate function of the judge to second guess the officials appointed really for these specific purposes, to be the Executive in the Executive branch to carry out the legislative wishes of the Executive branch on matters of this kind.

It assumes a close interrelationship, and for a judge to suddenly find himself where he has really put himself in a position where he is second-guessing the people as to what information may or may not be required with respect to foreign events which might be extremely important, it seems to me to just be an improper situation for that judge to be in. I would expect that if that were to occur, that I would then expect officers of the Government who have charge of such matters, and who are not able to get that information, to publicly castigate the judge, even though they couldn't possibly quite reveal what it was about. I would expect all kinds of altercations which I think would be very peculiar, because you really either suck the judge into the Executive branch or you let him stay there as a judge, properly deciding the kinds of things I think it is proper for a judge to handle.

Now, I know that the bill is criticized by some people who are somewhat in favor of it, because they don't really believe that the judicial warrant procedure is justified. And we have tried, therefore, to model it so that it can be applied by the judge in terms of his judicial function.

But when he starts, when a judge starts saying, "well, I don't really care what this or that secretary says about the importance of this or that kind of information because I don't happen to think it is important," he really is putting himself in a position where it can't be a hit-and-run thing because then it has to be a continuing function, and he might as well be appointed deputy secretary of whatever.

Senator CASE. Well, would the Senator yield just to make a comment on this?

We are providing a routine procedure here. We are not dealing with extraordinary cases of great national concern where the President's inherent authority is still going to exist, and where he is going to be able to operate in this area and all areas outside the law, that is outside the written law. We are not talking about that.

We are talking about establishing and regularizing a routine procedure, and it seems to me as to any cases of the sort that you are concerned about, supposing now that you were just supposing, ought to be left to that other area rather than to be put into the framework of a routine authorization of wiretapping established by legislation.

I would just like to say that. You don't have to comment if you don't want, but that is just the way it strikes me.

Attorney General LEVI. Well, I think it is covered, and I think the kind of extraordinary thing which you and I anticipated is really quite different.

Senator BAYH. Well, what concerns me, Mr. Attorney General, is if it is a matter that is clearly the kind of thing that we all envision as being necessary information for the conduct of our foreign affairs to protect our country, if it is clearly the kind of information that can be only obtained that way, we have a problem. We have just gone through a year's disclosure of instances where there was really some question as to whether this was really what the information was all about, or the kind of information they were after, and there was really a question about whether this was the only way to get it. The reason I think you need a judge, and it isn't dragging him kicking and screaming into the Executive branch, is letting the judge exercise the kind of function a judge traditionally exercises, to see that the warrant is issued on a sound basis. It isn't somebody, Democrat or Republican or X, Y, or Z sitting down there saying that this is necessary for the conduct of our foreign policy and that there is no way to get that certification, period. Sign your name, and there is nothing you can do to see whether it is Martin Luther King, Mr. X, Y, or Z who is being subjected to that kind of thing that none of us like. That is the concern I have.

Attorney General LEVI. Well, we have a disagreement, obviously.

It seems to me that the cases in the past are really cases which involved the agency. They involved whether the person under surveillance is really that kind of an agent of a foreign power, and that is what this bill speaks to. I don't know of the cases of which you are speaking which go to the other kind of a point as to whether it is sufficiently important to foreign intelligence. So that while one has a feeling that there have been great abuses, and there obviously have been, I think they are really on the agency point, and that is why the bill takes the direction that it does take.

I think on the other point I just have to respectfully disagree. I do not think that, and it may be that we have tried to model something that is impossible, that by having a warrant for part of the

determination on a probable cause basis and the rest on a certification basis or on the acceptance and appropriate minimization procedures, is an attempt which is bound to fail. As I said to you, Senator, I am philosophical about that.

I do know this. I know that in part of this area, years ago, an administration proposed or began to propose legislation that the appropriate congressional committee who considered it ran into problems and said, "well, really we like the way things are, and just keep on that way," and therefore nothing was done. So I don't think it is unlikely that that may be the outcome of this whole endeavor. But I rather hope that one could make steps which I really think, and I think you think, are improvements.

Senator BAYH. Well, let me say that I think we have a strong common ground. We want the improvements. Some of us are concerned that in the steps they are taking, that all intentions are for improvements, but we do not deal in legislative authority to leave things as they indeed are.

On the difference of opinion, I want to go back and study these cases. I want to go back and study whether my memory hasn't caused me to remember, whether we are really talking about agency questions that I had never looked at.

Let me ask you to direct your attention at another area here, and that is the area of designation of judges, seven judges that will be appointed. Do you interpret the language as it now reads to permit not only to allow the Attorney General to select the judge of the seven, but if the first judge says no, you can go shopping for the second and then the third judge?

Attorney General LEVI. Yes, I agree. You can go to each one of them, and there are probably prior attempts, and so I really wouldn't have thought that was going to be a very profitable enterprise, and my assumption is that so far as the Federal Government is concerned, it would prefer appealing to shopping around.

Senator BAYH. Well, why don't we just have that inasmuch as the Executive branch has its choice of seven, why don't we just initiate the appeal, if the request fails after the first judge?

Attorney General LEVI. Well, it is possible to do. You may have situations in which the Executive feels that it is extremely important to get an approval, and because it can't wait while there is an appeal being decided before a surveillance is being put on. So I am not sure that it is as simple a matter as just saying, "well, why not appeal?" I think there are those factors involved, so you might have to go to another—you know, I just wouldn't have thought there would be much shopping around at all involved.

Senator BAYH. Well, I think the point you make to go to the second judge might make it more difficult to get it the second time.

Attorney General LEVI. Well, I might say that, you know, we are dealing in a very sensitive area here, and I don't want to make it unworkable. I have to worry that we are not walking into something where we may just cut the Government off from information it absolutely requires.

Senator BAYH. I don't want to make it unworkable either, and part of the mechanism that is supposed to work is to make sure that a warrant is not issued without meeting a certain test. It seems to

me we are to permit—it is a ridiculous extreme, but I suppose it is a ridiculous extreme, you could shop all seven before you exercised the appeal. I don't think the Attorney General is about to do that, but I wish you would give some thought to that because I think that is a matter that causes some concern.

But one last area I would like to ask you to give your attention to is a matter of concern to a lot of people, and that is section 2528(b), the so-called disclaimer section of Presidential power, where "facts and circumstances giving rise to the acquisition are so unprecedented and potentially harmful to the Nation that they cannot be reasonably said to have been within the contemplation of the Congress." Isn't that opening a pretty big barn door?

Attorney General LEVI. Well, I really hadn't thought so particularly since it goes on to say "that in such an event, the President shall, within a reasonable time thereafter, transmit to the Committees \* \* \* under a written injunction of secrecy, if necessary, a statement setting forth the nature of such facts and circumstances."

That is certainly not intended to be a great barn door. I think you have to realize that legislation of this kind is bound to be somewhat experimental. It is very hard to know whether there is, particularly in a scientific area of this kind, whether there is something which somehow should have been covered and wasn't. And where it becomes very important, and really this speaks to something where we don't know what it is, we just cannot be—we don't know, we think it has to be terribly important, and then it has to be reported to the Congress, and that is really what it is saying.

Senator BAYH. What is a reasonable length of time?

Attorney General LEVI. I have no idea what a reasonable length of time is. I mean, if one could specify, that that certainly cannot be a problem.

Senator BAYH. Well, let me ask you to give some thought to that particular problem and see if we can't tighten it up a bit. I think here again you and I have reached the same conclusion, given the same question, but looking at what sort of mandate or fiat we are giving to someone, I would establish that it is a matter that concerns me.

Does the Senator from New Jersey have any questions?

Senator CASE. I think at this time I don't have, Mr. Chairman. I am much obliged to you and the Attorney General for his patience, and for his help.

I had an old draft of the bill that I was looking at before and I couldn't make sense out of certain things that were under discussion, and one of them the provision as to the use of the information. As you mentioned just now, an unusual situation in which the President had the right to reasonably determine an emergency situation exists with respect to the employment of electronic surveillance before an order can be obtained. That isn't what I was thinking of.

There is another section in here, go ahead.

Senator BAYH. Well, let me ask our staff to utilize the days that will be available in which Congress will not be officially meeting to meet with your staff and, with your permission, pursue some of these matters that have been raised, those which may be raised later by other witnesses to see if we can't reconcile some of the questions.

May we do that, please?

Attorney General LEVI. Of course, sir.

Senator CASE. I think I will have to pursue this by questions for the record, if I may, because I haven't yet reconciled my own understanding of this legislation because of the two copies of the bill that I have in front of me, and I don't want to delay the chairman of the Committee any further.

Attorney General LEVI. The Senator has the same problem I have, only I have to keep three drafts in mind.

Senator BAYH. Well, we are proceeding on the fourth.

Are there further questions, Senator Case?

Attorney General LEVI. Senator, I don't know whether you are talking about section 2526, which relates to the disclosure of information.

Senator CASE. I do have what I had in mind, Mr. Attorney General.

I asked you before if your review of a provision to require that nobody be paid a salary for engaging in any kind of electronic surveillance except under the provisions of this or the corresponding domestic law or statute, without a report being made of all such surveillance to the Congress, and you said this was a large question that you didn't want to comment on, at least not today in any final way.

What I had in mind was this provision of the June 11 draft of the bill; do you have that copy in front of you?

Attorney General LEVI. Yes; I do.

Senator CASE. Good.

On page 18, we turn to the Presidential powers section, and the thing I had in mind was under the disclaimer, and this legislation affecting the exercise of any constitutional power the President may have to get foreign intelligence information by means of electronic surveillance, and there are two instances either where it doesn't come within the definition, or "(b), the facts and circumstances are so unprecedented and potentially harmful to the Nation, they can't reasonably be said to have been within the contemplation of Congress," and then this provision, "that in such event, the President shall, within a reasonable time, transmit to the Committees on the Judiciary of the Senate and the House, under written injunction of secrecy if necessary, a statement setting forth the nature of such facts and circumstances." This is getting toward what I had in mind; and this far you would be willing to go.

Attorney General LEVI. Oh, yes, yes. It is the "(a)" which is where I didn't want to go that far, because that is really an entirely different kind of area. This involves so many different kinds of considerations that I thought we had really better think about it and not just assume it could be handled that way.

Senator CASE. Is this very different from suggesting that all electronic surveillance be reported?

Attorney General LEVI. Well, I don't know that we are using electronic surveillance in different ways, because what "(a)" says, if such acquisition does not come within the definition of electronic surveillance as it is given in the legislation, so the legislation really doesn't come to grips with it and it is beyond, therefore, the scope of the bill.

Senator CASE. All right, I see your point and this makes it appear that that section says a lot more than it says. I don't mean that anybody is dissembling in that connection, but this protection is much less than a protection against all electronic surveillance.

Attorney General LEVI. Well, there is another area which the public has discussed at various times, but which I really can't discuss very much, which this bill does not cover.

Senator CASE. Well, I guess we have at least raised the question, and you have deferred your answer until you have had a chance to think about it. You haven't, at least, ruled it out entirely.

Attorney General LEVI. Well, Senator, actually I have thought about it. I just think it is a mistake to take matters which really are not covered by this legislation and try to deal with them in this legislation. That is really—

Senator CASE. Well, that is what we are trying to do, is find out what is covered by this legislation.

Attorney General LEVI. Well, one way to do it is to note that it has to come under the definition of electronic surveillance. If it doesn't come under that, if it goes beyond that, then we say, well, it is outside the scope.

Senator CASE. Well, if I may, then, electronic surveillance is defined by the bill as meaning, "(i) the acquisition by \* \* \* surveillance device, of the contents of a wire communication to or from a person in the United States without the consent of any party thereto, where it occurs in the United States where the communication is being transmitted by wire." That means that all telegrams to or from a person in the United States are covered under the definition of electronic surveillance.

Senator BAYH. Aren't we really talking about the thrust of the whole NSA program?

Attorney General LEVI. We are talking about that portion of the NSA program which is not covered here, and which as I say, I really don't want to discuss in any detail.

Senator BAYH. We discussed it at some length yesterday in executive session.

Senator CASE. I wish you would make that point again, Mr. Attorney General.

Attorney General LEVI. The point I was trying to make is that there is a kind of sweeping surveillance which General Allen described in public testimony.

Senator BAYH. Mr. Attorney General, if this has been described in public testimony, then fine.

Attorney General LEVI. Well, only part of it. That has been referred to. And that is why it is a little difficult for me to do much responding. All I can do is refer to the fact that it was referred to. I know you had an executive session. A great deal of that is not covered by the definition.

Senator CASE. Well, is it your understanding that this bill, take section 2, that in order for something to come within the definition of electronic surveillance, there has to be a combination of (i) or (ii), or a combination of both paragraphs (i) and (ii)?

Attorney General LEVI. No. It is "or", (i), or (ii) or (iii).

Senator CASE. So why isn't any telegram—

Attorney General LEVI. Well, I might easily say, Senator, if there is a wire involved, a wire that is tapped in the United States, it is covered.

Senator CASE. OK.

Mr. Attorney General, I think I would not be justified in pursuing this further with you because of the convenience of other members of the Committee and other witnesses as well, and your own at this time. So I won't try to pursue it any further, but I do think you might, if you would consider the possibility of some kind of provision in this legislation which would cover the point that I tried to make before.

Thank you, Mr. Chairman.

Senator BAYH. I appreciate the cooperation of my colleague.

Mr. Attorney General, we appreciate your cooperation and we look forward to the product of our collective staff during the recess to see if we can't tighten this up where there are concerns so we can meet the dual purposes that we are trying to pursue here.

Thank you very much.

I am going to ask Congressman Drinan to come forward. I am going to have to run and vote, Congressman, but I'll be right back.

[A brief recess was taken.]

Senator BAYH. The next witness is Father Robert Drinan.

I apologize to all of the witnesses and to all of you who waited this morning. But I had to go to the floor to attend to other responsibilities and I just could not escape sooner. So I apologize to all of you.

Father Drinan, would you please proceed.

### TESTIMONY OF HON. ROBERT F. DRINAN, A U.S. REPRESENTATIVE FROM THE FOURTH DISTRICT OF THE STATE OF MASSACHUSETTS

Mr. DRINAN. Thank you very much, Mr. Chairman. No apology is needed. I understand the very heavy schedule that the Senate and the House have this week.

I am very pleased to appear here, and if I may, Senator, I would like to have my statement in its entirety inserted into the record at this point.

Senator BAYH. Without objection, so ordered.

[The prepared statement of Representative Drinan follows:]

#### PREPARED STATEMENT OF CONGRESSMAN ROBERT F. DRINAN

Mr. Chairman and members of the Committee, I am pleased to appear before you regarding a matter of utmost importance to the national security: the Foreign Intelligence Surveillance Act of 1976 (S. 3197). If this bill becomes law in its present form, it will indeed pose a very serious threat to the security of the nation. In my judgment this proposal is offensive to the Fourth Amendment, and allows unwarranted intrusions into the privacy of all persons within the jurisdiction of the United States.

When this bill was first introduced in the Congress last March, I was happy to see, at first glance, that the Administration had finally accepted the idea that court orders must be obtained to secure foreign intelligence information through electronic surveillance. For the past several years, the Department of Justice and the White House have steadfastly opposed any legislation which would require court approval before engaging in such surveillance in so-called "national security" cases. Upon further examination, however, I have concluded that the bill still gives the Executive Branch too much power to use wiretaps and other electronic devices to obtain foreign intelligence information.



I continue to believe that any electronic surveillance, whether approved by a court or not, violates the Fourth Amendment because such interceptions of private conversations can never satisfy its particularity requirement. It should be recalled that, to obtain a warrant for such surveillance under the Fourth Amendment, the applicant must submit a sworn statement, "particularly describing the place to be searched, and the persons or things to be seized." Invariably an application for a bug or a tap cannot be that specific; it cannot describe with particularity all the persons to be overheard or all the conversations to be recorded.

I also question the value of the information obtained from such surveillance. It is instructive to examine the annual reports of the Director of the Administrative Office of the United States Courts prepared under Title III of the 1968 Act. The reports show that, in 1973 for example, Federal agents listened to 112,314 conversations involving about 5,500 individuals. Less than half of these intercepts contained any relevant or allegedly incriminating information. The operations cost the taxpayers over \$1.5 million. Furthermore these statistics do not include the data on warrantless surveillance, which need not be reported under the 1968 Act.

But we should remember that Title III surveillance at least is directed at criminal conduct. Before any tap or bug can be authorized, the judge must find, among other things, "probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense" enumerated in Title III. S. 3197 has no such limitation. It is, pure and simple, an authorization to obtain information unrelated to crime or criminal conduct. This is a fundamental defect in the bill. Senator Tunney has said it represents the first time in American history that Congress would permit intrusions into the lives of aliens and citizens alike for activities having nothing to do with unlawful conduct.

Thus the underlying premise of the bill must be called into question: Is the authority sought in this proposal really needed? Has the Department of Justice or any of the bill's proponents presented hard evidence of the value of intelligence surveillance? For too long we have assumed the necessity of the intelligence gathering function through electronic surveillance. The extensive congressional hearing record—the impeachment proceedings in the House, the inquiries of the Church Committee, and hopefully the examination of S. 3197 by this Committee—demonstrates the very tenuous base upon which that assumption rests.

I understand this Committee intends to examine that question very carefully in the course of its deliberations. I commend you for undertaking that most critical examination. I should add, however, that the Administration has given the House Judiciary Subcommittee, of which I am a member, virtually no hard evidence of the need for this bill. Its presentation amounts to little more than generalities couched in terms of protecting the nation from foreign attack. That will not do. The congressional record to which I earlier referred is replete with examples of Presidents and Attorneys General using national security as a pretext for snooping into the lawful activities of political opponents or persons perceived to pose a threat to their political security.

On April 24, 1974, Morton Halperin, who worked for several years in the White House and the Defense Department on national security matters, testified before a House Judiciary Subcommittee. He took a very dim view of the value of intelligence gathered by electronic surveillance. "In my judgment," he noted, "such surveillance has extremely limited value and can in no sense be called vital to the security of the United States." Mr. Halperin based that view on his personal experience with such data and on his knowledge that "the American government has many other sources of information of significantly greater value."

The value of gathering foreign intelligence information in this fashion is diminished even further when the international implications of the matter are considered. In 1972 the Vienna Convention on Diplomatic Relations, ratified by the Senate in 1965, came into force in the United States. The Convention requires that the premises of a diplomatic mission and its personnel, including their private residences, be "inviolable" (see Articles 22, 24, 27, 29, and 30). In effect this treaty prohibits electronic surveillance of foreign emissaries and the premises they occupy. It also authorizes any signatory to apply its provisions "restrictively" if its missions in another nation are being tapped or bugged. Despite the existence of this Convention, S. 3197 does not mention its provisions nor seek a reconciliation with the terms of the treaty.

At the hearing before the House Judiciary Subcommittee, Attorney General Levi testified that the Foreign Intelligence Surveillance Act of 1976 is not inconsistent with the Convention. He based that opinion on a legal memorandum prepared by the Office of Legal Counsel in the Justice Department. Mr. Levi has

refused to provide the Judiciary Subcommittee with copies of the memo, but has offered to allow each member to read it *in camera*. I have read that document and have found it unpersuasive. I urge this Subcommittee to explore carefully the implications of the Vienna Convention and the Justice Department memorandum in the context of this bill.

That the bill (S. 3197) authorizes surveillance of non-criminal conduct and that no justification has been demonstrated for the extraordinary power are ample reasons to oppose it. But I have other objections which I would like briefly to explore. To be sure, the Senate Judiciary Committee has made several commendable changes. For example, it has provided criminal and civil remedies for violation of the new Chapter 120 of Title 18 (which this bill would enact), thus making its provisions mandatory. And it has repealed Section 2511 (3), the broad expression of presidential power which has been used to authorize warrantless surveillance. In so doing, it has narrowed the reach of Section 2528 of this bill, which deals with the critical question of presidential authority to tap or bug without a court order.

While the changes approved by the Judiciary Committee move in the proper direction of restricting unbridled presidential authority to engage in unrestrained surveillance, the limitations do not go far enough. I make bold to suggest that Section 2528, even as revised by the Judiciary Committee, be deleted from the bill. The President should be restricted to that electronic surveillance expressly and specifically authorized by Congress. If in fact the President's power to conduct warrantless surveillance in so-called "national security" cases arises from Article II of the Constitution, then there is nothing we can do to limit it. Thus, at best, the section is meaningless. If on the other hand, such power is concurrent with congressional authority then Section 2528 is an express authorization for warrantless surveillance by the President. I do not think Congress should approve that kind of power. We should recall that such authority has been used to intercept international communications of American citizens, conversations of citizens traveling or residing abroad, and exchanges between citizens and agents of foreign governments, even if the conversation is merely a call to a local embassy for tourist information. I hesitate to mention once again that such presidential power was also used to authorize break-ins of the kind for which Mr. Helms has escaped liability.

Turning to the definitional section of the bill, the definitions of "foreign intelligence information" and "foreign power" are much too broad. For example, "foreign intelligence information" includes any information "deemed essential . . . to the conduct of the foreign affairs of the United States." That definition has virtually no limits. There are many topics of conversation which every Secretary of State would deem essential to the conduct of foreign affairs.

The definition of "foreign power" is also overly expansive. It includes, among others, foreign governments, factions of a foreign government, foreign political parties, and foreign military forces. This means that a conversation between an American citizen and an officer or employee of a foreign political party is potentially a subject for surveillance. The reach of that definition is far too expansive.

Furthermore, the application for a court order does not require that the Government specify the name of the person who is the subject of the surveillance. It requires only a "characterization of the person". [Section 2524 (a) (3).] Thus the Government may withhold from the judge the name or names of the persons sought to be covered. Additionally, the bill allows the judge to continue that concealment in the court order, which only requires the judge to specify "a characterization of the persons targeted by the electronic surveillance." [Section 2525 (b) (1) (i).]

Furthermore, the bill contains only vague and inadequate provisions relating to "minimization", the overhearing of conversations unrelated to "foreign intelligence information." The proposal merely requires the Government to advise the judge of the steps it will take to minimize such intrusions. Experience under present law demonstrates the inadequacy of such provisions. The statute should specify the necessary measures to be imposed to minimize unnecessary invasions of privacy. At a minimum, the Attorney General should be authorized to promulgate minimization regulations, applicable in all cases.

But the most serious deficiency in the minimization area is that the bill does not limit the use of conversations overheard unrelated to the purpose of the surveillance. Section 2526 (b) of the bill states: "The minimization procedures required under this chapter shall not preclude the retention and disclosure of information which is not foreign intelligence information acquired incidentally

which is evidence of a crime." When government agents obtain evidence of crime through electronic surveillance not intended for that purpose and totally unrelated to alleged criminal activity, they should not be allowed to use it for prosecutorial purposes. Such "fruit of the forbidden tree" should not be available for use at trial or for other purposes.

In this same vein, the bill makes no provision for notifying innocent persons whose conversations have been recorded merely because, for example, they called the embassy of a foreign country for travel information. Any time these "foreign intelligence" taps result in the interception of conversation unrelated to the subject of the surveillance, the innocent victim should be notified, or the records destroyed, or both. In fact the bill does not mandate any destruction of data or recordings which are worthless or unrelated to the purpose of the surveillance.

In this context, the bill should provide for a public advocate to protect the rights of innocent parties. Since S. 3197 allows *ex parte* applications and allows *ex parte* extensions of existing bugs or taps, some mechanism is necessary to protect the rights of third parties who are unwittingly caught in the Government's dragnet surveillance. If such an office were established, I would have greater confidence that the privacy of citizens would be secured more fully.

A provision for a public advocate takes on added importance when the "renewal" features of this bill are examined. The Government may seek an unlimited number of 90 day extensions for any surveillance authorized under the bill. Thus the intrusion could go on for years. The bill also authorizes the Attorney General to approve emergency taps when a court order cannot be obtained in the period of time necessary. He must then submit the normal application to the judge within 24 hours.

If the judge denies the application, the bill gives the court the discretion to notify the innocent victims of the initial 24 hour surveillance. But the Government, at an *ex parte* proceeding, may request that such notice be postponed for 30 days. Thereafter, again after an *ex parte* proceeding, the court is prohibited from serving such notice if the Government has made a further showing of "good cause". This exception makes a mockery of the limited notice rule in emergency surveillance situations.

Finally S. 3197 requires employees of communications companies, landlords, custodians, and others to provide whatever assistance is necessary for the Government agents to effectuate the surveillance. [Section 2525 (b) (2) (ii).] I vigorously oppose any such provision that requires innocent workers to participate in this "dirty business" of surveillance. If such persons want to provide assistance on a voluntary basis, that is up to them individually. But this bill would require their involuntary participation. That is totally offensive, in my judgment, in a democratic society based on respect for individual rights.

In short, Mr. Chairman, S. 3197 is an attempt to give the American people the impression that adequate steps are now being taken to protect their privacy in communications that may involve alleged foreign intelligence information. But upon close examination, the bill is quite deficient. It does very little, even after amendment by the Judiciary Committee, to control the discretion of the Executive Branch to engage in this kind of electronic surveillance. Unsupported appeals to "national security" should not determine whether this bill becomes public law. "The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions," as the District Judge in the Pentagon Papers case cogently observed. And an integral part of our free institutions is the security of the people from intrusions by government agents into their privacy. I urge this Committee, in the strongest words I can, to reject this cosmetic proposal.

Mr. DRINAN. I will not go back over the material that the Committee heard yesterday because I have here and read very diligently last night the entire proceedings of the day before yesterday when the basic elements of this bill were set forth.

Mr. Chairman, in my judgment this proposal is offensive to the fourth amendment and allows unwarranted intrusions into the privacy of all persons in the United States.

I think we should go back to the fourth amendment and actually read the words that the applicant must submit a sworn statement, "particularly describing the place to be searched and the persons or things to be seized." In my judgment an application for a wiretap simply cannot be that specific.

The underlying premise of the bill must be called into question. Is the authority sought in this proposal really needed? As a member of the Kastenmeier subcommittee of the House Judiciary Committee, we had the honor of having Mr. Edward Levi, the Attorney General, testify. In my judgment, he failed to produce any specific facts that would justify the Department of Justice or the administration requesting this unprecedented power. The presentation that he gave amounted to little more than generalities couched in terms of protecting the Nation from foreign attack.

May I make just three or four points, and then I want to stress a particular treaty which I think is very important.

For example, on the definitional aspects of this bill, the term "foreign power" is overly broad. Second, the application for a court order does not require that the Government specify the name of the person who is the subject of surveillance. Furthermore, Mr. Chairman, I am very disturbed at the absence of any provision to notify innocent persons whose conversations have been recorded merely because they may have been calling the embassy of a foreign nation. In addition, S. 3197 has a provision which is totally contrary, I think, to all of the instincts that we have. This bill would require employees of communication companies, landlords, custodians, and others to provide whatever assistance is necessary for the Government agents to effectuate these surveillances.

I am entirely opposed to any such provision that requires innocent workers to participate in the dirty business of surveillance. If such persons want to provide assistance on a voluntary basis, that is entirely up to them. Mr. Chairman, that is a point that, as far as I read the proceedings of Tuesday, was not discussed.

Let me come to a point that has not yet arisen in the hearings that I am delighted this Committee is conducting. The value of gathering foreign intelligence information in the fashion proposed by the administration is diminished even further when the international implications of the matter are considered.

In 1972, the Vienna Convention on Diplomatic Relations, ratified by the Senate in 1965, came into force in the United States. The convention requires that the premises of a diplomatic mission and its personnel, including their private residences, be "inviolable." In at least five sections of the treaty that word "inviolable," or variations thereof, are used. In effect, this treaty prohibits electronic surveillance of foreign emissaries or embassies and the premises they occupy. It also authorizes any signatory to apply its provisions "restrictively" if its missions in another nation are being tapped or bugged. Despite the existence of this convention, S. 3197 does not mention its provisions nor seek a reconciliation with the terms of the treaty.

At the hearing, Mr. Chairman, before the House Judiciary Subcommittee, Attorney General Levi testified that the Foreign Intelligence Surveillance Act of 1976 is not inconsistent with the convention. He based this opinion on a legal memorandum prepared by the Office of Legal Counsel in the Justice Department. When I pressed Mr. Levi for a copy of this memo, he first refused to provide the Judiciary Subcommittee with copies; then he allowed members to read it *in camera*.

Mr. Chairman, I read that document *in camera* yesterday. A member of the Attorney General's staff came and sat in my office while I read it. I found it very unpersuasive.

Why it should be secret, I do not know. But I am bound by the conditions that I cannot disclose the secret parts. I would urge this subcommittee to examine very carefully everything in that memo. Subpena it, if necessary, and read it, so that you may explore the implications of the Vienna Convention and the Justice memorandum which states that S. 3197 is not in any way in contravention of the Vienna Convention.

Let me just finish, Mr. Chairman, by stating this. I believe that S. 3197 is an attempt to give the American people the impression that adequate steps are now being taken to protect their privacy and communications that may involve alleged foreign intelligence information. But on close examination which your Committee has done, the bill is seriously deficient. It does very little, even after all of the amendments of the Senate Judiciary Committee, to control the discretion of the executive branch to engage in this type of electronic surveillance. The reservation which it makes for the alleged inherent power of the President allows the National Security Agency, for example, to continue its dragnet electronic surveillance.

Unsupported appeals to national security should not determine whether this bill becomes public law. "The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions," a quotation which I take from the opinion of the district court judge in the Pentagon Papers case. An integral part of our free institutions is the security of the people from intrusions by Government agencies into their privacy. I urge this Committee, in the strongest words that I can, to reject this cosmetic proposal urged upon us by the administration and the Attorney General.

I thank you for your attention.

Senator BAYH. Congressman Drinan, I appreciate your taking the time to let us have your thoughts. You have been interested in this area for a long, long time.

I have just one question for you because I know you are as busy over on your side as we are here. We have some proponents of this legislation who have been longtime civil libertarians. Their basic argument is that if this bill were passed in its present form, conditions relative to the acquisition of warrants for surveillance would be under greater restrictions and the situation, as far as those who are concerned about our civil rights are concerned, would be better after the passage of this legislation than the situation as it now exists. I take it from what you have said briefly that you do not concur with this view.

Mr. DRINAN. You are quite right, Mr. Chairman.

As an editorial in the Boston Globe said in its caption yesterday, this is "Wiretapping the Innocent," and if I may, Mr. Chairman, I would like to submit this editorial from the Boston Globe to the record at this point.

[The article referred to follows:]

#### WIRETAPPING THE INNOCENT

Sen. Edward M. Kennedy has overvalued the need of government to impose on its citizens in endorsing the wiretap bill before the Senate. The bill permits the White House to wiretap American citizens who are not suspected of any crime.

To obtain a warrant for a wiretap of conversations to and from abroad, the government would have to show only that the citizen might be engaged in "clandestine intelligence activity"—a formidable-sounding phrase that the bill never defines and that the Justice Department says includes lawful political activity.

Moreover, even though the warrant would be obtained under less strict requirements than those for a criminal warrant, any evidence obtained during the wiretap could be used in a criminal prosecution. The bill thus authorizes a broader government "fishing expedition" than would be allowed even against a known member of organized crime. And Federal crimes related to foreign policy are so numerous and so vaguely defined that even government officials unknowingly break the law.

Supporters of the bill rightly argue that it is at worst comparable to current law as interpreted by the courts, and in several sections it offers substantial progress. Presidents would be required to obtain warrants for wiretaps of conversations abroad, and they would be forbidden to wiretap domestic conversations except under normal criminal procedures.

The rules for securing warrants would require the executive branch to persuade a judge of probable "clandestine intelligence activity"—although courts are inclined to accept the government's contentions having refused only 13 of 4863 wiretaps sought under the Omnibus Crime Control Act.

And as part of the warrant procedure Justice Department and White House officials would have to attest, under civil and criminal liability, that the taps would be used only for specified legitimate purposes.

All of these changes are substantial protections for the privacy and free speech rights of citizens, and they are a real improvement over the unchecked, warrantless wiretapping practiced by the past several administrations.

But Congress should not put itself on record, for the first time in history, as favoring broad wiretapping powers over citizens not suspected of crimes. To be acceptable the bill should be amended to include, at minimum, a narrow and specific definition of "clandestine intelligence activity," with no loophole like an "and such other activities as may . . ." clause.

Sen. Kennedy has suggested a less workable alternative amendment, requiring the President and Congress to create a criminal definition of "clandestine intelligence activity" within two years after passing the bill. The definition would likely be a catchall that might not be useful in obtaining convictions but that would extend wiretapping of citizens not really involved in crimes.

Mr. DRINAN. Many worthy people knowledgeable in civil liberties have said that this would at least give some protection. I think they miss the essential point that never in the history of American law has this Congress ever allowed a wiretap for the purpose of acquiring information alone. This is an entirely new departure unprecedented in our history. Always we have had probable cause for crime or suspected crime, and that has been permitted. But to suggest that since the Federal Government now, for at least 30 or 40 years, has presumably been tapping the phones of all diplomats and other aliens suspected of doing drastic things, to say that because that has gone on we must now involve the Federal judiciary to give it a certain blessing, it seems to me, is a pernicious form of logic.

Senator BAYH. Thank you very much.

Mr. DRINAN. Thank you very much, Mr. Chairman.

Senator BAYH. Thank you for your participation.

I would like to put into the record at this time a letter from our colleague, Senator Gaylord Nelson; a letter to Chairman Inouye from Aryeh Neier, executive director of the ACLU; a Statement by Women Strike for Peace; and a letter, again sent to Senator Inouye, from Edward F. Snyder; executive secretary of the Friends Committee on National Legislation.

[The information referred to follows:]

LETTER TO SENATOR BIRCH BAYH FROM SENATOR GAYLORD NELSON

Re S. 3197, the Foreign Intelligence Surveillance Act.

SENATOR BIRCH BAYH,

*Chairman, Subcommittee on the Rights of Americans, Senate Select Committee on Intelligence Activities, Washington, D.C.*

DEAR SENATOR BAYH: In testimony submitted to the Subcommittee on Criminal Laws and Procedures on March 30, I directed most of my comments to the two major issues posed by S. 3197: (1) the serious flaws in section 2528, dealing with the question of "inherent" presidential power and (2) the difficult legal and political question of whether foreign intelligence wiretaps should be permitted to occur in any circumstances other than after a judicial finding that there was probable cause to believe that the proposed target was involved in criminal activity. Since that time, significant improvements have been made in the presidential power section, and the "probable cause" issue is being fully ventilated by Congress, scholars and the press. Because your subcommittee has decided to hold hearings on S. 3197, I would like to call your attention to several other issues, which have received comparatively little examination.

1. Section 2524 sets forth what must be in the government's application for a court order. Section 2524(a)(8) requires that the application include "a statement of the facts concerning all previous applications known to the Attorney General that have been made to any judge under this chapter \* \* \*". The phrase "known to the Attorney General" may be innocuous. However, in the past, the FBI and the Justice Department have limited the number of people who have known about the Bureau's electronic surveillance efforts in order that Justice Department lawyers could truthfully deny in court that electronic surveillance had been conducted in certain cases. We should not create the possibility of a situation where the Attorney General could say that he had no knowledge of previous applications under this chapter, if in fact, such applications had been made. The statute makes it clear that the Attorney General is supposed to personally approve all wiretaps under the act; (Section 2524(a)) consequently, it would not change the meaning of the bill to delete the words "known to the Attorney General," and it would prevent the possibility of future abuse.

2. Section 2527 sets forth the requirements that the Attorney General report annually to the Administrative Office of the United States Courts and Congress on the number of foreign intelligence wiretaps sought; the number approved; the number in progress; the duration of the taps, etc. These statistics alone will be of little, if any use, to Congress in its oversight function. S. Res. 400, which established this committee, notes that it is "the purpose of this resolution to provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States." It should be made very clear that Section 2527 in no way forecloses the Intelligence Committee from conducting thorough oversight of the operation of this legislation. As the statute is presently written, the Attorney General could argue that Section 2527 represents the extent of what he must supply to Congress, and that this specific statute must take precedence over the more general language of S. Res. 400. The draft language of the Judiciary Committee report comments that "these statistics may also provide a basis for further inquiry by appropriate committees of the Congress," but this tepid statement is not sufficiently explicit to guarantee the kind of rigorous oversight which Congress should be contemplating.

3. Section 2523 provides that seven federal district court judges designated by the Chief Justice of the United States shall have jurisdiction to hear applications for electronic surveillance under this chapter. This proposal has received a substantial amount of criticism from those who object on principle to the involvement of the Chief Justice and those who believe that this process would inevitably lead to "handpicking" of judges likely to be sympathetic to government arguments that foreign intelligence wiretaps are needed.

Representative Kastenmeier's subcommittee is giving careful consideration to alternative ways of selecting judges, and hopefully, your committee will do the same. Even if you conclude that the basic approach for selecting judges is sound, provisions should be made to assure that the Executive will not be able to make

every application for a warrant or court order to the judge who establishes the most sympathetic "track record." Admittedly, in cases of "ordinary crime," the government has wide latitude in choosing a judge to approach for a search warrant. However, the nature of this legislation militates against giving the government a completely free hand. "Ordinary crime" cases often end in a criminal prosecution, in which the target of surveillance can test its constitutionality of the surveillance and the sufficiency of the warrant application through a suppression motion. In electronic surveillance for foreign intelligence information, most surveillances will not result in criminal prosecution; in those that do, the criminal defendant may be denied access to the application and order on grounds of national security, leaving the judge to make an ex parte determination of the lawfulness of the "tap." [Section 2526(c)] Taken together, these facts point to the need to restrict the executive's freedom of choice among the judges who have jurisdiction under the statute. It would seem desirable to require that applications be made to the eligible judges in some sequential order, barring "emergency" situations in which applications might have to be made to which ever judge was available within the 24 hour time period. [Section 2525(d)]

4. In my prior testimony on S. 3197, I expressed concern that the definition of "foreign intelligence information" (Section 2521(b)(3)) was "disturbingly broad" and that this overbreadth could lead the government to acquire and retain conversations which should be constitutionally protected. Because this point has received little attention so far, it seems important enough to raise again.

Foreign intelligence information, is defined to include "information with respect to foreign powers or territories, which because of its importance is deemed essential to the security or national defense of the Nation or to the conduct of the foreign affairs of the United States." [Section 2521(3)(ii)] The Church Committee investigations disclosed that from 1966 to 1968, the FBI provided President Johnson with bi-weekly reports on conversations by or about anti-war Senators and Congressmen overheard by bureau agents wiretapping foreign embassies. According to the Washington Post, this information was apparently regarded as the "political by-product" of national security wiretaps; no pretense was made that the information itself was "essential to the national security." But with the definition of "foreign intelligence information" as presently written, these views could easily be classified as information important "to the President for his conduct of foreign affairs."

Proponents of this section would argue that the definition is not overly broad because (1) it requires that the information be "essential" to the conduct of foreign affairs, and (2) that it be information "with respect to foreign powers or territories." However, the standard for retaining conversations overheard is less stringent than the definition of "foreign intelligence information"; information can be retained if it relates to the conduct of foreign affairs of the United States. [Section 2525(4)] It is all too easy to envision a situation in which a court order is obtained for an electronic surveillance of a foreign embassy, and the conversations of Congressmen about foreign policy views are overheard and retained because they "relate to the conduct of foreign affairs."

My suggested solution is to delete the phrase "conduct of foreign affairs of the United States" from the definition of "foreign intelligence information." An alternative approach to the same objective would be a flat prohibition on the retention of conversations of Americans overheard who are not "agents of a foreign power" or conspiring with or aiding and abetting such agents.

I commend you for making S. 3197 the first substantive business of the new intelligence committee. This vital legislation can be improved by continued close scrutiny and amendment; the result will be a measure which more strongly protects precious first and fourth amendment rights.

Sincerely,

GAYLORD NELSON, *U.S. Senator.*

LETTER TO SENATOR DANIEL INOUE FROM ARYEH NEIER, EXECUTIVE DIRECTOR,  
AMERICAN CIVIL LIBERTIES UNION

JUNE 17, 1976.

Senator DANIEL K. INOUE,  
442 Russell Senate Office Building,  
Washington, D.C.

DEAR SENATOR INOUE: I am writing to suggest that you, as chairman of the Senate Select Committee on Intelligence, exercise your powers under Section 3(b) of S. Res. 400 to request referral of S. 3197, the national security wiretap bill, to



your committee. This legislation, recently reported out of the Senate Judiciary Committee, represents the Justice Department's effort to secure congressional authorization for national security electronic surveillance.

The American Civil Liberties Union has opposed all wiretap legislation in the past. We are particularly concerned about legislation, such as S. 3197, which authorizes electronic surveillance of Americans unrelated to enforcement of the criminal laws. This legislation, intended to cure problems which the Department faces as a result of a number of federal court decisions, would permit the FBI to conduct electronic surveillance of Americans for "foreign intelligence" unrelated to enforcement of the criminal laws. As you are no doubt aware, the Church Committee refused to endorse the legislation and cautioned the Congress against adopting any legislation which authorized the use of covert intelligence collection against Americans unrelated to criminal law enforcement. The American Civil Liberties Union endorses that position, and encourages your committee to re-examine the wiretapping legislation in light of the Church Committee findings.

Enactment of S. 3197 in its present form would not only contradict the Church Committee position on electronic surveillance. Senate adoption of the bill as reported would seriously complicate the work of your committee in attempting to develop a legislative charter for the domestic intelligence activities of the federal government. For example, the Church Committee suggests that surreptitious entries and mail openings should be conducted pursuant to the same procedure as electronic surveillance. The Department of Justice will, predictably, argue that any new charter should authorize the FBI not only to wiretap, but also open mail and conduct so-called "black bag jobs" against Americans subject to the vague standards of S. 3197.

Once this legislation is enacted by the Senate the representatives of the Department of Justice will undoubtedly contend that less intrusive techniques, such as physical surveillance and informant coverage, should be permitted in the same circumstances. We see this legislation, therefore, as the opening wedge by advocates of broader investigative authority for the FBI and other intelligence agencies to secure a legislative charter acceptable to the intelligence community.

The ACLU also objects to provisions of the legislation pertaining to disclosure of the product of electronic surveillance; the use of product in criminal proceedings; the failure of the legislation to deal with electronic surveillance by the National Security Agency; and the so-called inherent authority exception at the end of the legislation. The ACLU Washington office would be happy to provide further assistance and detailed analysis of the legislation if you so desire.

Regardless of whether you or the members of your committee share the American Civil Liberties Union's position on the bill, it is essential that the new committee both establish its jurisdiction over such legislation and make it clear to the rest of the Congress that oversight of intelligence activities will be sensitive to civil liberties. It is important that the committee and the rest of the Congress not forget the abuses of Watergate, the CIA's CHAOS program, the NSA's unrestricted electronic surveillance of international communications, the FBI's COINTELPRO program, and the rest of the FBI's 40-year domestic intelligence program including such abuses as harassment and blackmail of Dr. King. These and other abuses of the intelligence community gave rise to the demand for the Church Committee investigation and the creation of effective, congressional oversight machinery, including the committee which you chair. It would be a terrible irony if your committee and the Congress decided that its oversight responsibilities were to be directed simply at making the intelligence machinery more efficient and less objectionable from a foreign policy perspective and forgot the impact of these programs upon the rights of Americans.

Again, if we can be of any further assistance on this legislation or on any of the new committee's work, please do not hesitate to contact us.

Sincerely,

ARYEH NEIER, *Executive Director.*

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#### STATEMENT BY WOMEN STRIKE FOR PEACE, JUNE 29, 1976

Women Strike for Peace is firm in its opposition to the Foreign Intelligence Surveillance Act of 1976. S. 3197 would, for the first time in American history, authorize wiretaps on aliens and some Americans solely for the purpose of gaining information about undefined and unspecified "clandestine intelligence activities". We deplore the existing administration's practice of placing foreign intelligence wiretaps without warrants. However, we are greatly concerned that the warranting

procedure embodied in S. 3197 would legitimize an executive practice of questionable legality and desirability—wiretaps unrelated to crime. It also places the Congress and the Judiciary in support of this surveillance.

We are concerned that acceptance of a warranting procedure for electronic surveillance unrelated to crime establishes an alarming precedent. This legislation may be followed by legislation seeking a warrant procedure for mail openings and "surreptitious entries" unrelated to crime. The result may be to legitimize all of the techniques illegally employed in the past.

Women Strike for Peace, a women's movement dedicated to the achievement of world peace through general and complete disarmament, strongly believes in establishing people to people communication around the world including that with those in the communist countries. S. 3197 would inhibit Americans from making such peaceful contacts.

How tragically ironic: while the nation celebrates 200 years of democratic rights, the Congress prepares legislation to deprive American citizens of these rights.

LETTER TO SENATOR DANIEL INOUE FROM EDWARD F. SNYDER, EXECUTIVE SECRETARY, FRIENDS COMMITTEE ON NATIONAL LEGISLATION

JUNE 24, 1976.

Senator DANIEL INOUE,

*Chairman, Senate Intelligence Committee, United States Senate, Washington, D.C.*

DEAR SENATOR INOUE: The Friends Committee on National Legislation wishes to submit for the record its opposition to S. 3197 to authorize foreign intelligence electronic surveillance. This Committee opposes all wiretapping and secret interception of communication as a violation of the individual's right to privacy guaranteed in the Fourth Amendment. However, we find the following provisions of S. 3197 particularly objectionable.

The grounds for approval of foreign intelligence electronic surveillance are much too broad. A federal judge must only find "probable cause" that the target of surveillance is a "foreign power or agent of a foreign power," and "that the information sought is foreign intelligence information that cannot feasibly be obtained by any other means." All of the terms "foreign power," "agent of a foreign power," and "foreign intelligence" are defined so broadly as to be meaningless. For example, an agent of a foreign power need only be "a person engaged in clandestine intelligence activities . . . or who conspires with, assists, or aids and abets such a person . . ." Thus, the person who is subject to surveillance may not even be engaging in any criminal activity.

The procedures stipulated in the bill for ascertaining the need for a foreign intelligence wiretap do very little to protect the rights of innocent people. The Friends Committee on National Legislation is concerned about the provision authorizing the Attorney General to establish an emergency wiretap for twenty-four hours without an application to the court. Although the court is given the discretion to notify innocent victims, such notice may be postponed at the request of the government for thirty days, and would be prohibited altogether if the government has made a further showing of "good cause." Court-approved wiretaps are valid for ninety days, with an unlimited number of ninety-day extensions authorized under the bill.

This bill contains an unfortunate provision that information unrelated to foreign intelligence may be used to prosecute other crimes. This provision only serves to further highlight the indiscriminate power which would be granted to the law enforcement authorities under the bill.

The recent Report of the Senate Select Committee on Intelligence provides a dismal chronicle of abuses by our own United States intelligence agencies. These abuses included hundreds of warrantless break-ins by the F.B.I. to install electronic listening devices. If such abuses are to be halted in the future, it will require carefully written legislation which respects the rights of United States citizens, and *not* legislation like S. 3197, which would only leave open the possibility of further government interference with constitutional rights.

Sincerely yours,

EDWARD F. SNYDER.

Senator BAYH. Our next witness is Aryeh Neier of the American Civil Liberties Union. Following him we have Herman Schwartz, professor at the Law School of the State University of New York at

Buffalo; Philip Heymann, professor at Harvard Law School; and Philip A. Lacovara, an attorney, who was former Assistant Solicitor General and Watergate Deputy Special Prosecutor.

If I might suggest so as not to further inconvenience those of you who have already been significantly inconvenienced, I apologize for the lack of organization with which the Senate runs and a mistake on the part of this subcommittee chairman in failing to perhaps spend somewhat less time with some witnesses than has been done. May I suggest, and I do not want to offend anyone, but inasmuch as there are certain basic questions on which I would like to have the opinions of all of these witnesses, that we hear the testimony from the four remaining witnesses and then have them sit as a panel to deal with the questions.

Does that offend anyone involved?

[No response.]

Senator BAYH. Well, since I hear no objection, we will ask that that be done.

Mr. Neier, would you proceed with your testimony, please.

**TESTIMONY OF ARYEH NEIER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION; ACCOMPANIED BY HOPE EASTMAN, ATTORNEY, AND ASSOCIATE DIRECTOR OF THE WASHINGTON OFFICE OF THE ACLU**

Mr. NEIER. Thank you very much, Senator.

I am testifying on behalf of the ACLU, and with me is Hope Eastman, an attorney, and the associate director of our Washington office.

Senator, if we may, we would like to submit our prepared statement for the record, and then comment briefly on a few points that are raised in the prepared statement.

[The prepared statement of Mr. Aryeh Neier follows:]

**PREPARED STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION**

The ACLU is pleased and honored to be asked to participate in the first legislative hearings being held by this Committee. We look to the Senate Intelligence Committee to begin drafting and reporting legislation urgently needed to bring the intelligence agencies under the Constitution.

S. 3197, the bill which is the subject of these hearings, provides you with the first real test of your responsibilities. Enactment of this bill would authorize electronic surveillance for general intelligence-gathering purposes for the first time. It poses in stark terms, the key question which confronts you: will the Congress, in an illusory reform, participate in sacrificing the Bill of Rights in the name of national security?

The ACLU believes that S. 3197, which the *New York Times* says "seems to legalize more electronic surveillance than it prohibits" (June 15, 1976), is a step backwards in several important respects.

First, acceptance of it implies acceptance of the argument that the Bill of Rights must give way to claimed exigencies of national security, arguments which have been made since our nation began.

Second, enactment of S. 3197, with any so-called disclaimer on inherent Presidential powers amounts to Congressional acquiescence to the existence of such powers despite the Church Committee's recommendations that the Congress reject such claims.

Third, enactment of the bill gives the Justice Department a "blank check" and will constitute a "back door" charter for FBI domestic intelligence activities,

because inquiry into protected political activities will inevitably be the starting point of an investigation into whether someone is a foreign agent under an essentially undefined standard.

#### SUBVERTING THE BILL OF RIGHTS IN THE NAME OF "CLANDESTINE INTELLIGENCE ACTIVITIES"

In May of 1798, less than a decade after the adoption of the U.S. Constitution, James Madison wrote to Thomas Jefferson:

"Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger real or pretended from abroad." One month after that letter was written, Congress enacted the infamous Alien and Sedition Acts, to protect infant America from European subversion. That precedent was repeated during the Civil War when Lincoln suspended the Writ of Habeas Corpus, during World War I and later in the Red Scare of the 1920's when "radicals" were persecuted by the federal government and during World War II when the federal government incarcerated 120,000 Japanese-Americans in detention camps. The most dangerous and repressive descendant of the Alien and Sedition Acts is the 40-year domestic intelligence program of the Federal Bureau of Investigation so carefully documented in Book II of the final Report of the Senate Select Committee on Intelligence.

In every one of these cases, Presidents, the Congress, and the courts were seduced, like that early Congress, by the argument that subversion of our basic principles and the Bill of Rights was essential to protect our government from foreign subversion. We urge you to read S. 3197 with this history in mind.

Certainly the most disturbing aspect of S. 3197 is its authorization of electronic surveillance of Americans who are engaged in "clandestine intelligence activities." The key phrase "clandestine intelligence activities" which triggers surveillance of persons other than embassy officials and employees is not defined in the bill. When asked for a definition of the term by Senator Kennedy in the hearings before the Senate Judiciary Committee, Attorney General Levi replied that "an attempt to define with specificity can only create enormous difficulties." (Hearings, page 25). He went on to say that any attempt to define the phrase broadens it beyond how it should be applied.

We submit that by "clandestine intelligence activities" the Department of Justice really means foreign subversion. In asking your approval of S. 3197, the Administration asks for the same authority which President Adams asked Congress in 1798, which the Wilson Administration exercised in the Palmer raids of 1919, and which President Roosevelt delegated to Director Hoover to launch the 40-year FBI domestic intelligence program. President Adams justified the prosecution of Jeffersonians through the Alien-Sedition Act upon the theory that they were subversive agents of the French government. President Wilson and his Attorney General, Mitchell Palmer, were afraid of Americans who sympathized with the successful Bolshevik Revolution. In 1936 President Roosevelt was afraid of Fascist and Communist sympathizers within the United States during the period immediately preceding World War II.

Attorney General Levi and President Ford fear foreign subversion in the form of Soviet and Third World influence. They are concerned about the activities of Arab and Zionist groups in this country. Their solution is the same as that of Presidents Adams, Wilson and Roosevelt, Attorney General Mitchell Palmer and former FBI Director Hoover. They all made the same arguments which you hear from the administration today. "The criminal laws are inadequate." "The criminal laws cannot be corrected." "We cannot be restricted to criminal laws." "We cannot be more precise about the conduct which should be subject to investigation."

Remember the language of the Alien and Sedition Act:

It authorized the President to deport persons engaged in "secret machinations" against the government.

It made it criminal to "resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States . . ."

Remember the orders that the FBI sent to its agents which culminated in the Palmer Raids and the Red Scare after World War I:

Investigate "anarchism and similar classes, Boshevism; and kindred agitations."

Remember what led President Roosevelt to authorize the FBI to begin its domestic intelligence program which culminated in the abuses of COINTELPRO typified by the illegal electronic surveillance and attempted blackmail of Dr. Martin Luther King:

Hoover told President Roosevelt that the Longshoreman's Union, the United Mineworkers and the Newspaper Guild were controlled by the Soviet Government.

We hope that the same pressures that led Presidents and Congresses to respond to those arguments will not lead you down the same path. Ironically, the Congress is considering this extraordinary proposal, not in time of world revolution or on the eve of a world war, but in a period of relative domestic and international tranquility.

We urge you to proceed with caution in responding to these pressures. Recognize that a period of peace is an opportunity for careful deliberation, not a time to rush headlong into an unbridled delegation of authority to the Executive Branch. This latter approach to governmental surveillance is as risky here as it was in times past. James Madison warned in *Federalist* 51 of the danger of depending upon good men alone to safeguard our liberties:

"If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

Edward Levi may be to some the closest to an angel we have had recently in the office of Attorney General, but he will not be there forever. The federal judges upon whom S. 3197 places so much reliance are only human and, like attorneys general, are not all angels. Federal judges and attorneys general were all part of the prosecutions under the Alien and Sedition Act, the persecution of the radicals in the "red scare" of the 1920's and the detention of Japanese-Americans in World War II. Attorneys general failed to restrain and at times encouraged J. Edgar Hoover in his domestic intelligence endeavors and federal judges refused to entertain complaints by victims of his programs.

The basic lesson of this history and the Church Committee revelations is that authority granted for intelligence investigations will be stretched as far as conceivably possible, and further, and that for the most part the quality of justice meted out by the officials of government must be more a function of the laws they administer than their good instincts and character.

#### SUBVERTING THE BILL OF RIGHTS IN THE NAME OF INHERENT EXECUTIVE POWER

Section 2528 of this bill represents a congressional recognition of the inherent power of the President to spy on Americans. This is also a familiar theme in the history of the competition between national security and the Bill of Rights.

It was Richard Nixon's justification for Watergate generally. It was John Ehrlichman's specific defense for the break-in to Dr. Fielding's office to search for Daniel Ellsberg's medical records. That defense was recently relied upon by the Court of Appeals for the District of Columbia Circuit, in reversing the convictions of Barker and Martinez for their role in that break-in. (*United States v. Ehrlichman*, No. 74-1882, *United States v. Barker*, No. 74-1883, and *United States v. Martinez*, No. 74-1884, D.C. Cir. May 17, 1976).

In the face of that recent history it is painful to read language in this bill recognizing "constitutional power of the President" . . . "to acquire foreign intelligence information."

The Church Committee adopted as its first recommendation:

"There is no inherent constitutional authority for the President or any intelligence agency to violate the law." Is this Committee really willing just to ignore that recommendation in its first action in this field since the issuance of the Church report?

Proponents of S. 3197 suggest that Congress is powerless in the face of executive claims of inherent power to engage in this surveillance. Senator Kennedy, in introducing this bill on March 23, 1976 said:

"This bill thus does not attempt to resolve the complex and difficult issue surrounding whether the President has an inherent constitutional power to engage in electronic surveillance in order to obtain foreign intelligence information essential to the national security. Nor could it define or restrict the scope of such a power if one exists. The Supreme Court alone must ultimately decide that issue." Congressional Record S. 3987-8, daily ed. March 23, 1976.

This fundamentally understates the power, and indeed obligation of the Congress to express itself on this question. In the *Steel Seizure Case*, the Supreme Court made it clear that congressional action or inaction was key to determining the scope of Presidential power. *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952). As Mr. Justice Jackson characterized it:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. . . .

2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . . Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.

*Id.* at 635-8.

If the Congress specifically rejects its claims of inherent power, the Executive Branch will stand in a far different position if and when the Supreme Court passes on the ultimate question: Thus, the alleged neutrality of Section 2828 is in fact a form of acquiescence. Instead, Congress should explicitly adopt the first recommendation of the Church Committee in Book II. This is also the remedy proposed in H.R. 214, the Bill of Rights Procedures Act, which Senator Mathias discussed in the hearings. That bill would repeal Section 2511 (3) of Title 18, thus conforming all wiretaps to the existing criminal law framework:

Finally, the inherent authority section is in this bill because the Department of Justice does not want you to legislate on the subject of electronic surveillance conducted by the National Security Agency. The Administration would prefer that the incredible technology of the super-secret NSA be at the President's disposal without limit. Therefore not only is NSA exempted from the bill, but the Administration asks you to recognize in Section 2528 that a statutory charter is unnecessary for NSA because the agency can operate pursuant to the President's inherent authority.

The Church Committee revelations of abuse of NSA, including the electronic surveillance of Americans on so-called watchlists and the SHAMROCK program, whereby NSA received for almost 30 years copies of most international telegrams. The Church Committee proposed (in Book II recommendations 14-19) a legislative scheme to protect the Fourth Amendment rights of Americans inadvertently overheard in NSA surveillance. Although those proposals require some study and refinement, according to Senator Mondale's testimony they are acceptable to NSA. They are certainly preferable to an unbridled delegation to the President in the name of "inherent authority" contemplated by S. 3197.

#### S. 3197: A BACKDOOR CHARTER FOR DOMESTIC INTELLIGENCE

S. 3197 will both implicitly authorize government domestic surveillance programs and serve as a model to blunt Congressional attempts to limit other investigative and surveillance techniques.

Although he refuses to define the term, the Attorney General makes it clear that "clandestine intelligence activity" as well as the terms "terrorism" and "sabotage" include conduct which is not now a violation of the criminal code. The Attorney General is also unwilling to propose broadening the code so that it would include all of the conduct for which he wishes to conduct electronic surveillance. The heart of the matter is that the FBI wishes to be free to continue to conduct intelligence investigations aimed at law-abiding citizens whose political activities the Bureau does not like. This bill would accomplish that end.

Not only could the Bureau secure warrants to wiretap those that it believes to be agents of foreign powers engaged in clandestine intelligence activities, but it could also secure warrants against those who are aiding or abetting such individuals even if they do not know that the individuals are foreign agents or that they are engaging in conduct which the Attorney General has unilaterally defined as "clandestine intelligence activities." This bill would have consequences far worse than that.

How is the Bureau to gain the information necessary to determine if an individual is in fact the agent of a foreign power, is engaged in clandestine intelligence activity, or is aiding and abetting such a person all without regard to whether the activity is illegal?

The only way to do this is to continue the domestic intelligence investigations directed at "dissidents" to determine if their conduct is at the direction of a foreign power, if it is clandestine, or if it is aiding and abetting a person engaged in such activity. What more justification does the Bureau need to infiltrate the NAACP or the Socialist Workers Party, to conduct surveillance of members of protest groups of every description, to open files on those in contact with foreign govern-

ments? All of the abuses well documented by this Committee's predecessor will in the future be described to this Committee, if this bill passes, as authorized by the Congress as necessary to determine who should be subject to electronic surveillance.

Even if the bill were limited to tapping embassies and foreign officials, a practice which conflicts totally with our obligations under the Vienna Convention, the problem would remain.

Adoption of the bill would thus seriously complicate the work of your committee in attempting to develop a legislative charter for the domestic intelligence activities of the federal government. For example, the Church Committee suggests that surreptitious entries and mail openings should be conducted pursuant to the same procedure as electronic surveillance. Once this bill becomes law, the Department of Justice will, predictably, argue that any new charter should authorize the FBI not only to wiretap, but also to open mail, and to conduct so-called "black bag jobs" against Americans subject to the vague standards of S. 3197.

Should this legislation be enacted, the representatives of the Department of Justice will undoubtedly contend that less intrusive techniques, such as physical surveillance and informant coverage, should be permitted in the same circumstances. We see this legislation, therefore, as the opening wedge by advocates of broader investigative authority for the FBI and other intelligence agencies to secure a legislative charter acceptable to the intelligence community.

#### "THE BEST WE CAN DO" IS NOT GOOD ENOUGH

Proponents of S. 3197 argue that this bill is the best we can get and that, even with its admitted dangers and deficiencies, its requirement of a warrant is far better than existing Executive Branch unilateral exercise of this power. We disagree on both points.

First we believe there is support for greater control than this bill represents. Much has been made of the fact that the Administration and its Attorney General are supporting this limitation on the President's so-called inherent powers after years of opposition. The argument is that the Congress should take advantage of this willingness even if this statute falls far short of what Congress knows is necessary to respect the Bill of Rights.

We do not believe, as some have suggested, that the Administration is more sensitive than its predecessors to the demands of the Bill of Rights. We believe they know that their warrantless searches stand on shaky ground and they want Congress to act to authorize widespread foreign intelligence surveillance of Americans before the climate gets worse.

In the *Keith* case (*United States v. United States District Court*, 407 U.S. 297 [1972]) the Supreme Court has held that the customary Fourth Amendment requirement of judicial approval for initiation of search and surveillance applies in "domestic security" cases. In *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir., 1975) (en banc) the United States Court of Appeals for the District of Columbia has stated:

"Indeed, our analysis would suggest that absent exigent circumstances no wiretapping in the area of foreign affairs should be exempt from proper judicial scrutiny irrespective of the surveillance or the importance of the information sought.

Therefore, it is fair to suggest that the bill we have before us is less restrictive of the Executive Branch than the courts have thus far approved. Secondly, the atmosphere five years ago when Senator Kennedy and others rightfully first sought to control wiretapping of American citizens was quite different than it is today. All the revelations of Watergate, the Church and the Pike Committees have sensitized the Congress and the public to the extremes to which the Executive Branch will go in invading the rights of its citizens.

This forces us to disagree sharply with those proponents of S. 3197 who contend that their legislation is, although not perfect, the only alternative to no legislation at all. Without it, they say, the Executive will be free to wiretap without any controls. This argument is not new. We heard the same arguments when Congress enacted laws authorizing "no-knock" searches and preventive detention in 1970. At that time Attorney General Mitchell argued that "no-knock" searches were being conducted outside the law and that it would be better to have a statute to regularize their use. Preventive detention too was necessary because courts were detaining defendants prior to trial by imposing high money bond in violation of the Sixth Amendment. Yet the "no-knock" and preventive detention statutes were themselves terrible infringements of our civil liberties, enacted somehow in order to protect them. The situation is no different here.

The warrant procedure created by S. 3197 is not an adequate enough control to justify accepting the many provisions of the bill which have received so much criticism. In the first place, even under Title III warrants have a rubber-stamp quality. In the six years of experience under Title III, figures compiled by the Administrative Office of the U.S. Courts show that only 13 of 4,863 warrant applications were turned down. Judicial deference in the foreign intelligence area is apt to be even greater.

Moreover, Section 2523 insures that it will be almost impossible for the government to fail to win judicial approval of the taps it seeks. Section 2523 authorizes the Chief Justice to designate seven judges with nationwide jurisdiction to hear all requests. If any one of the seven judges turns down the request, the government is free to repeat its request before each of the other six. If it fails to get approval, it can appeal to a special panel of three judges also hand-picked by the Chief Justice. If those three judges affirm the denial, the government can seek further review in the Supreme Court.

Furthermore, the judge's discretion is sharply curtailed under the bill. While he or she must find probable cause that the target is a foreign agent, the government's certification that the tap is necessary to obtain foreign intelligence information must be accepted by the judge.

And perhaps most importantly, the traditional safeguard present in the normal criminal area—an adversary hearing on the constitutionality of the wiretap—is precluded here. Section 2526(c) allows information obtained or derived from the surveillance to be introduced without disclosure to the defendant of the fact of surveillance, the order or the accompanying application. The judge may decide in camera if the surveillance was proper and in most cases he or she is precluded from making any disclosure to the defendant who nevertheless may be prosecuted. Experienced defense lawyers believe that only the fact that the criminal defendant and his or her lawyer have an opportunity to challenge it makes the warrant even arguably a safeguard. That guarantee is lost here.

The warrant procedure's defenders argue, lastly, that at least a paper record will be created, involving high government officials in the decision. We cannot forget, however, that Attorney General Robert Kennedy approved the taps on Dr. Martin Luther King. President Johnson ordered the tapping of the South Vietnamese Embassy to find out about the political activities of a prominent Republican, Anna Chenault, on behalf of Richard Nixon. And Attorney General Mitchell and Secretary of State Kissinger approved the seventeen taps against reporters and government officials. The additional requirement that carefully selected federal judges are to be brought into the circle of those who know about such taps is a slender reed indeed on which to place so grave a departure from the Bill of Rights.

#### ACLU RECOMMENDATIONS

As we said above, enactment of this bill is not the only choice before the Congress. The ACLU opposes all electronic surveillance. We believe that wiretapping and bugging are, by their nature, general searches which violate the letter and the spirit of the Fourth Amendment. We opposed the enactment of Title III of the 1968 Omnibus Crime Bill which authorized wiretaps as part of the investigation of certain crimes. With that statute the FBI can already obtain warrants, based on probable cause, that existing statutes relating to espionage, sabotage or terrorism have been violated.

We urge you to join us in our opposition to any new authorization for electronic surveillance for foreign intelligence purposes. We believe that this Committee should instead do three things: enact a prohibition on all foreign intelligence electronic surveillance, repeal Section 2511(3) of Title 18 which now recognizes some inherent executive power, and enact a variety of mechanisms to guarantee that those prohibitions will be obeyed. The ACLU Board of Directors, in considering a broader package of proposals for reform of the intelligence agencies, endorsed some of the following ideas which we urge you to consider. They are all designed to limit the Executive Branch's ability to violate the law in secret and, as they have for years, get away with it.

Take the FBI out of the intelligence business, limiting it once again to investigating the commission of crimes;

Protect "whistleblowers" in order to encourage revelation of activities which would violate these prohibitions on wiretapping to Congress and to the public;

Create a permanent, independent office of Special Prosecutor, one job of which would be to monitor compliance with this law;



Make it a criminal offense for a federal official whose duties are other than ministerial to willfully fail to report evidence of these limits on wiretapping to the Special Prosecutor;

Make it a crime for intelligence agency officials or senior non-elected policy makers to willfully deceive Congress or the public regarding wiretapping activities which violate the law or the limits imposed on intelligence agencies;

Limit Executive Privilege to the "advice" privilege guaranteeing Congressional access to all other information on the way the Executive Branch uses wiretapping;

Advertise the availability of the civil remedies for those whose rights have been violated by intelligence officials or organizations should they carry out unauthorized wiretaps.

#### CONCLUSION

Mr. Chairman, a startling and frightening series of abuses brought this committee into existence after many years of fruitless attempts. It is important that the committee and the rest of the Congress not forget the abuses of Watergate, the CIA's CHAOS program, the NSA's unrestricted electronic surveillance of international communications, the FBI's COINTELPRO program, and the rest of the FBI's 40-year domestic intelligence program, including such abuses as harassment and blackmail of Dr. King. It would be ironic if the first act of this Committee were to be the sanctioning of investigations into the lawful political activities of Americans—the very practice which produced much of the abuse. We trust that you do not intend to permit that to happen. As Senator Mondale so succinctly put it, in his appearance before you earlier this week, speaking of Executive Branch responsibility, "before it was their fault. Now, it will be our fault."

Mr. NEIER. This committee was created in response to a year and a half of disclosures of the political surveillance activities and other abusive activities conducted by the intelligence agencies. As yet, the Congress of the United States has not passed legislation to curb any of the abuses which were revealed in the course of the last year and a half. If this bill is enacted into law, it would be the first piece of legislation that is adopted in response to the disclosures of the past year and a half.

It seems to us extraordinary that the Congress should be seriously considering passing legislation not designed to abolish or curb the abuses that have been revealed, but, rather, designed to provide authorization for the very same abuses revealed in the past year and a half.

The principal justification that is offered for adopting this legislation is that the practice has been going on anyway. It has been going on for a long period of time and, it is argued, some larger protection is provided if it is subjected to court review. If there is some warrant procedure, it is said it will safeguard the rights of citizens.

I think it is necessary to examine how limited that judicial review would actually be.

The warrant procedure is proposed in the absence of any of the usual standards for determining whether a warrant should be issued. A warrant is ordinarily issued because there is believed to be a particular violation of law that is taking place or is about to take place. This proposed legislation does not have any such standard. Instead it quite specifically is meant to cover the gathering of information on activities that have taken place in the absence of specific violations of law. As the Attorney General stated to you this morning, the primary purpose of such surveillance is not to obtain evidence for criminal prosecution, although that may be the result in some cases.

The warrant procedure that is proposed is also very limited because the judge who is called upon to issue the warrant is not even allowed to consider whether, or what kind of, foreign intelligence information is involved. The judge is only able to determine whether the target of the proposed surveillance is an "agent of a foreign power." "Agent of a foreign power" is very broadly defined. It can mean an agent of a foreign political party. It can also be someone who knowingly assists someone who is an agent, and the "knowingly assists" provision does not have to be, or it does not say in the legislation that it has to be, with knowledge that the person is an agent. Apparently it can mean knowingly assist in the collecting of information, but not necessarily knowing that the person who is collecting the information is doing so as an agent of a foreign power or as an agent of a foreign political party.

Senator BAYH. Would you excuse me? I am sure you heard the Attorney General express his interpretation contrary to that.

Mr. NEIER. Well, I am afraid the legislation does not say anything contrary to that. The legislation says "knowingly assists." I think the legislation could be reworded, if there were to be legislation, and I am not sure there should be. In fact, I do not think this legislation should be adopted at all. The legislation could be reworded to say the person knows that someone else is engaged in a particular activity. As it is written, it is only "knowingly assists" in the collection of such information.

Senator BAYH. You might give some attention—realizing that you would prefer to have no legislation, but that we want to do the best we can to do what is right and that it might not totally please you—you might give some attention, if you would, to some of the specific language of those areas in doubt. This is one area where there is legitimate concern.

Mr. NEIER. Let me deal a little more with the warrant procedure and point out that it is further defective, because, in addition to the usual kind of judge shopping that is provided for in such warrant procedures, this uniquely allows the Government to appeal the denial of a warrant. It gives the Government quite a number of bites at the apple in order to make sure that it gets the warrant. Perhaps most important of all, a warrant procedure ordinarily becomes effective because of notice provisions. When the citizen who has been the target of some search or surveillance as a consequence of a warrant ultimately finds out that a warrant has been issued and challenges the basis for the issuance of the warrant, that is when a warrant becomes meaningful. There is a circumscription of the effort to obtain warrants, because of the possibility that the target will ultimately find out about it and will ultimately be able to challenge it.

Under the procedures contemplated in this bill, there would never be any opportunity for the person spied on for intelligence purposes to find out that a warrant has been issued allowing that person's privacy to be invaded. Even in the case of a person who is prosecuted for a crime as a result of information that is turned up under this procedure, the right to know about the warrant and to see the supporting information is much less than it would be in any other circumstance.

It seems to us that what is described as some protection in this bill, the warrant procedure, is the weakest possible protection. It is hard to imagine a way of drafting this legislation so as to more effectively nullify the one thing that is suggested as a reason to enact it.

On the other side, there is an overwhelming reason not to enact legislation of this sort. The overwhelming reason is that for the first time the Congress of the United States would be establishing a middle ground between activity that is criminal and activity that is subject to constitutional protection.

The Congress of the United States would be saying that American citizens may be participants in activity which has never been made illegal by the Congress of the United States; nevertheless that activity cannot be safeguarded from the prying eyes and the prying ears of law enforcement agencies.

If this kind of prying is legitimized, it is hard to imagine what kind of prying would not be legitimized. Of all forms of surveillance, it is difficult to think of any that is more intrusive into peoples' lives, that is more sweeping in what it gathers about people and the intimate details of their lives which are exposed, than wiretapping. Mail opening would be of very little concern if the far more intrusive surveillance that is involved in wiretapping is legitimized. It is proposed that our laws create a grey area that involves activity that is not unlawful. If it were unlawful, one would not need this legislation at all. This legislation is, as the Attorney General has told us, intended to authorize the gathering of intelligence in the absence of an effort to bring criminal prosecution. Criminal prosecution is only an occasional serendipitous consequence of the gathering of such intelligence information. Yet, we are told that this activity, which is not criminal, is not constitutionally protected activity; that the Government has a right to set off this amorphous area as subject to surveillance, even though it is not made criminal or not directly made unlawful by the Congress of the United States.

Senator BAYH. And yet, to use information gathered under that guise for subsequent criminal prosecution.

Mr. NEIER. They may, but that is not the intention.

Senator BAYH. But that compounds the problem.

Mr. NEIER. Yes, it does. It makes possible fishing expeditions for intelligence-gathering purposes which then may be used for criminal prosecutions. It overcomes the more difficult problem of obtaining a warrant for the actual purpose of bringing a criminal prosecution. Moreover, where there is a criminal prosecution, the surveillance permitted by this legislation is very extensive. This legislation allows an open-ended surveillance of that person, not just the surveillance that may be necessary for the actual purpose of bringing a criminal prosecution.

The Attorney General talks about guidelines for minimization. It is hard to imagine what could possibly be done in minimizing the information that is collected. The intelligence services have always told us that a little bit of information here and a little bit of information there is what they use to piece together some larger mosaic which tells them what is going on. Under those circumstances, if one is to believe what the intelligence agencies have always said about the way

in which they proceed, minimization seems to run exactly contrary to their professed purposes.

The Attorney General on several occasions told us that the persons who are to be the targets of this surveillance have to be part of the official network of a foreign government. Yet, the Attorney General's definitions as provided in this legislation go far beyond people who would be part of the official network of a foreign government.

I am not proposing to you that you try to cure the wrongs in this bill by fixing the legislation or providing tighter definitions. It seems to us the entire thrust of the legislation is wrong. The entire thrust of the legislation is to create this amorphous area of activity that is not criminal but is still a target for surveillance.

Any future administration, the present administration, whoever, is free to expand or contract what is covered in that grey area in accordance with their own taste. The Federal courts in their warrant procedures would be virtually reduced to rubber-stamping the activities of the executive branch of the Government. They would be limited to determining only whether the person who is the target is an agent of a foreign power or is knowingly assisting an agent of a foreign power. Again, the definition of agent of a foreign power is by no means limited to the actual agents of the official aspects of foreign governments.

Given the very large defects that we see in this legislation, we believe that the Congress of the United States should refuse to adopt this legislation. The legislation also has a disclaimer clause which is apparently intended to protect the activities of the National Security Agency. From the way in which the Attorney General kept referring to things that he was not free to talk about, I could not help wondering what other surveillance activities were also not being revealed in the course of this legislation.

The legislation legitimizes those activities in a fashion never undertaken before. It says that those are going forward but that the Congress should not be specifically authorizing any particular activities of an agency such as the National Security Agency. The legislation does this in obscure references never actually naming the National Security Agency itself. One is only supposed to infer that somehow its activities are being shielded from further scrutiny and further specific authorization or limitation by the language of this legislation.

Given these defects and even with any effort to give greater specificity to the categories that are involved, even with efforts to narrow the range of surveillance, we think it would be an enormous mistake to adopt this legislation. We think it would be a travesty to do so as the first item of business by Congress after the extraordinary disclosures of the surveillance activities undertaken by the intelligence agencies over the last year and a half. The Congress should not be responding to those abuses by putting its own stamp of approval on future abuses. That seems to us an impossible result, or a result you should think impossible in response to what we have learned in the last year and a half.

Thank you, Mr. Chairman.

Senator BAYH. Thank you, Mr. Neier. We make note of the fact that Ms. Hope Eastman, associate director of the ACLU, is accompanying you.

I would ask that we proceed with the panel forum. Let's ask Professor Schwartz to join us, if he would, at this time.

Ms. EASTMAN. Do you want us to move over?

Mr. SCHWARTZ. Mr. Heymann has requested that he be allowed to go next. I will follow him, then.

Senator BAYH. That is fine. In fact, if you would all like to come up to the table and support one another, that would be acceptable. I feel rather embarrassed at the way this has become drawn out today, deeply embarrassed. As I noted, I was delayed over on the floor.

# **STATEMENT OF PROF. PHILIP HEYMANN, HARVARD LAW SCHOOL, CAMBRIDGE, MASS.**

Mr. HEYMANN. Mr. Chairman, Philip Lacovara asked me to make his apologies and to explain that he had a long-set appointment for 2 p.m. He wants this statement submitted for the record. He would have been the fourth member of the panel. He wanted me to express his willingness to appear at any time you please for questions, if you have them, or to respond to questions in writing. He was very sorry to have to go, but felt that he had to do so.

Senator BAYH. Well, I certainly do not believe he owes us his apologies; it is the other way around. I look forward to reading his testimony and would like to discuss this matter with him in person later on. He certainly has been in a unique position to help this Committee reach some final conclusions.

[The prepared statement of Mr. Philip Lacovara follows:]

## **PREPARED STATEMENT OF PHILIP A. LACOVARA**

Mr. Chairman, I am pleased to accept the committee's invitation to appear this morning to offer some comments on the proposed Foreign Intelligence Surveillance Act of 1976, which Senator Kennedy has introduced at the request of the President and which the Judiciary has already approved in a slightly amended version.

In formulating my comments, I draw upon the experience I have had dealing with national security and electronic surveillance issues in government positions, especially as Deputy Solicitor General with responsibility for the government's criminal and internal security cases before the Supreme Court, and as Counsel to Watergate Special Prosecutors Archibald Cox and Leon Jaworski. In a paper I delivered in January 1976 at the Symposium on Presidential Power sponsored by Duke University, I have set forth at some length my analysis of the Constitutional issues and questions of public policy raised by the use of electronic surveillance to gather foreign intelligence. This paper will be published shortly in the journal "Law and Contemporary Problems" and I request that it be included as part of the Committee's record. I will not attempt to cover in detail this morning the points made in that paper.

In my judgment this bill reflects three basic premises with which I firmly agree. First, modern techniques of electronic surveillance offer important tools in the collection of foreign intelligence. Second, the Constitution leaves room for the collection of foreign intelligence through electronic surveillance even when the target is not engaged in a crime. Third, the creation of a realistic system of judicial supervision of this kind of intelligence practice is vital to the legitimacy and propriety of foreign intelligence electronic surveillance.

I have no major Constitutional problems with the bill as currently drafted, and I support its enactment.

I am including as an appendix to my prepared statement this morning what can be considered a checklist of the principal issues of public policy and Constitutional law that must be addressed in considering a system of electronic surveillance to gather foreign intelligence. The provisions of S. 3197 respond to most of the issues that I have enumerated, and in my opinion most of the judgments reflected in the proposed legislation are reasonable accommodations of the governmental

and individual interests at stake. In the balance of my statement, I would like to review some of the salient features of S. 3197, pointing out where the basic judgmental questions are addressed and noting any reservations or objections I may have about these judgments or about the failure to deal with specific issues.

#### LIMITED SCOPE OF COVERAGE

At the outset, the Committee should understand what this bill would do and what it would not do. It is directed only at electronic surveillance, not at surreptitious entries to photograph or seize data—so-called black bag jobs—and it also has a relatively restricted geographical focus. Under the definitions in proposed Section 2521, the tapping of any wire communication (telephone, telegraph, telex, etc.) is covered only if either the sender or receiver is in the United States and if the interception takes place in the United States. I leave to the experts whether present or foreseeable technology will allow the interception of wire communications wholly within the United States from a point outside the United States; if so, they would not be covered. More clearly not covered are international wire communications since it is relatively simple, I understand, to intercept these communications at a point outside the United States. The bill therefore seems designed to leave outside its coverage the interception of international wire communications—even of a purely private or commercial nature—as long as the interception takes place off-shore or abroad.

Similarly, radio communications are covered only if both the sender and intended recipients are within the United States and only if made "with a constitutionally protected right of privacy." Quite obviously, therefore, the bill would have no application whatsoever to international radio traffic, even of a private or commercial nature. And even within the United States radio transmissions would not be subject to this bill if they were not made "with a constitutionally protected right of privacy."

This phrase—"constitutionally protected right of privacy"—has been substituted by the Judiciary Committee for the phrase originally included in the bill—"reasonable expectation of privacy." I understand that no substantive change was intended. That latter phrase is the one the Supreme Court used in holding, for the first time nine years ago, that the Fourth Amendment's protection against unreasonable searches and seizures applies to electronic surveillance not involving physical trespass. See *Katz v. United States*, 389 U.S. 347 (1967). This standard is applied in practice on the domestic scene by requiring warrants for virtually all non-consensual uses of electronic surveillance in criminal investigations. Those warrants are governed by Title III of the Organized Crime Control Act of 1968, 18 U.S.C. §§ 2510, et seq. The danger that a law enforcement officer may erroneously make the judgment that a "reasonable expectation of privacy" is not present and therefore that no warrant need be obtained is monitored in practice by the "exclusionary rule," which bars the admission into evidence of any information improperly seized by a warrantless surveillance. Where foreign intelligence gathering is involved, however, a criminal prosecution is not the likely object, and thus there is little anticipation or judicial review after the event. Accordingly, a provision making the restrictions of this bill inapplicable where a government official decides there is no "reasonable expectation of privacy" or no "constitutionally protected right of privacy" leaves this judgment to the virtually unfettered and unreviewed discretion of government agents. It would be much more prudent to define expressly the class of interceptions, if any, that should be excluded from coverage.

The definitional section also covers the installation of devices to be planted in the United States to monitor conversations. This of course refers to so-called "bugs" which can be planted in any office or home—indeed in any room in one's home. There is no restriction on such use. Moreover, here again the bill is made inapplicable to the planting of "bugs" under circumstances in which a person has no "constitutionally protected right of privacy." The absence of any judicial supervision or interpretation of this concept makes it a questionable exception, even though it, in terms, simply reflects the Constitutional line between communications covered by the Fourth Amendment and those that are not. Under one man's interpretation, this exception might apply only to conversations held on a public street, but under another interpretation it could apply to conversations in a train station, hotel lobby, baseball game, and so forth. With the phenomenal increase in technological skill making it possible to pick up human conversations at great distances, it is very difficult to know whether a person walking along a

street or having lunch in a restaurant could conduct a conversation that intelligence agents would regard as covered by a "constitutionally protected right of privacy." It might be more prudent and more helpful for Congress to attempt at least an illustrative enumeration of the kinds of interceptions not meant to be covered.

Finally on this opening point, I note that the bill has no apparent application to American citizens or American corporations (or anyone else) outside the United States. Although the extra-territorial effect of the Fourth Amendment is uncertain, it may be worth the attention of Congress to consider whether or not the same restrictions, different restrictions, or no restrictions should be applicable to the gathering of "foreign intelligence" abroad when American citizens are the targets.

#### POTENTIAL TARGETS OF ELECTRONICS SURVEILLANCE

The definitional section also limits the targets of permissible electronic surveillance under this bill. Basically, the targets fall into two categories. The first includes "foreign powers"—defined to be foreign governments, political parties, military forces, or their controlled enterprises. The second major class covers "agents of a foreign power"—defined to include two distinguishable groups of people: (a) either any officer or employee of a foreign power except resident aliens or United States citizens, and (b) any person, including a resident alien or American citizen, who is engaged in or is knowingly assisting in clandestine intelligence activities, sabotage, or terrorist activities pursuant to the direction of a foreign power. This focus is, in my judgment, quite appropriate and, although it makes any employee of a foreign government subject to electronic surveillance for intelligence purposes, I cannot question the reasonableness of such a sweep.

#### NATURE OF ACCESSIBLE INFORMATION

Limiting the potential scope of the coverage of the bill is its definition of "foreign intelligence information." As defined, the object of such a surveillance must be either information deemed necessary to our military security, or to the ability of the United States to protect itself against the intelligence activities of foreign powers, or information about foreign powers or territories considered essential to the "conduct of foreign affairs." The precise contours of these limitations are not clear. In the modern interdependent world, it is possible to justify the collection of virtually any information about a foreign power as "essential" to the conduct of "foreign affairs." Admittedly, therefore, this is an open-ended concept. But in light of the restrictions on the possible targets from whom the information can be garnered by electronic surveillance, I would be prepared to leave the application of this standard, as the bill does, to the political and diplomatic judgment of the Executive.

#### CONSIDERATION OF APPLICATIONS WITHIN EXECUTIVE BRANCH

Sections 2522 and 2524 outline in very broad terms the processing of a possible electronic surveillance within the Executive Branch. Section 2522 provides that the Attorney General may approve applications to designated federal judges if the President has given written authorization empowering the Attorney General to approve such applications. Nothing more is said in this section or elsewhere in the bill about the internal review procedures that should take place before it is determined that an electronic surveillance is appropriate. In fact, Section 2524 states that each application "must" be approved by the Attorney General if he finds that certain conditions are met. Although I believe the draftsmen probably meant only to make his approval a precondition to the submission of an application to a judge, the language now appears to leave the Attorney General no discretion not to submit a requested application if the minimum conditions are met. I question whether this is desirable.

The bill also is deficient in failing to provide any statutory description of the kind of documentation that should be prepared and maintained reflecting the analysis and deliberations within the Executive Branch. On the basis of my experience with the Watergate affair, I suggest it would be quite an effective additional guarantee of proper government conduct for Congress to require explicitly that certain records must be made and kept by the Executive Branch in connection with each proposed foreign intelligence electronic surveillance.

The heart of the bill is Section 2524 which sets forth the items to be included in the application presented to the court. Apart from the formal recitals of authorization, the application must give the identity of the target and the facts and circumstances justifying the applicant's belief that the target is a foreign power or an agent of a foreign power and that the facilities or place at which the surveillance is directed are being used or are about to be used by such a person. This is the limited scope of the facts for which "probable cause" must be established.

The bill also requires a description of the type of information sought and a certification by a senior official in the national security establishment that the information sought is "foreign intelligence information" that cannot "feasibly" be obtained by normal investigative techniques. As amended by the Judiciary Committee, Section 2524 also requires a certification that the purpose of the proposed surveillance is to obtain foreign intelligence information. This requirement, although no guarantee that the power will not be misused for domestic political purposes, is a further safeguard against the use of this mechanism on a mere pretext.

Two points are notable, however, about the certifications. First, the court is to be given no authority to second-guess this certification that the information sought really fits within the definition of "foreign intelligence information." Second, the directive that electronic surveillance not be sought unless other, less intrusive techniques are certified not to be feasible, provides a worthwhile protection, only if government agents seriously consider other alternatives.

Another desirable feature of the bill is the requirement that the application state the procedures by which the acquisition and retention of information relating to permanent resident aliens or citizens of the United States, other than foreign intelligence information, will be minimized. One of the principal problems in the use of electronic surveillance is that it is an inherently indiscriminate technique for gathering information. The problem is compounded when the targets are resident aliens or American citizens, most of whose conversations will involve personal matters of no legitimate interest to the government, rather than "foreign intelligence information." The problem of "minimization" has come up with Title III wiretaps in criminal investigations and in my understanding has been resolved with a reasonable degree of restraint. Many courts now have experience with the techniques for minimization on the basis of nearly eight years of implementation of Title III.

The application is also to project the time for which the electronic surveillance must be maintained. In addition, the bill wisely makes explicit the judge's right to require further information that he considers necessary to make his determinations.

The sections dealing with the Executive Branch's functions do, however, contain a significant omission in failing to identify the class of persons who will be authorized to apply for these warrants or to execute them. It seems to me to be a matter of legitimate Congressional concern to know whether only trained FBI agents will be involved, or whether any employees of the American intelligence community will be eligible, or conceivably whether cooperative agents of other governments might be utilized.

#### THE ROLE OF THE COURTS

The principal structural innovation promised by S. 3197 is, of course, its provision for judicial authorization of foreign intelligence surveillances. As I have explained at greater length in my Duke University paper, made available to the Committee, it is uncertain whether judicial warrants are constitutionally necessary for foreign intelligence surveillances, but in my opinion it is in any event quite important as a policy matter to develop such a system. This bill would do that.

Section 2523 creates a limited class of federal judges who may pass upon and authorize applications for foreign intelligence electronic surveillances. The Chief Justice is to designate seven district judges, who presumably will be geographically dispersed. Since the provision says that they have jurisdiction to approve electronic surveillance "anywhere within the United States" it is clear that the Attorney General may apply to any of the seven judges without regard to the locus of the proposed surveillance. This sort of option, coupled with the implicit authorization to make successive applications to different judges, practically guarantees that the Attorney General will be able to obtain an order approving an electronic surveillance in virtually every case in which it is sought.



Section 2522 provides that, upon a proper application, one of the designated judges is authorized to grant an order in conformity with other provisions approving the electronic surveillance. Although the section says that the judge "may grant" the order, other sections make clear that this is an obligation and not simply an opportunity, if the statutory criteria are satisfied.

Terming the role of the federal judges as little more than "rubber stamps" may be an exaggeration, since there is no reason to doubt that the judges will act in good faith to apply statutory criteria. But the role of the judges under the proposed legislation is a very narrowly circumscribed one. As I shall discuss in a moment in dealing with the standards for granting court orders, the authority of the judges is confined essentially to passing upon the "probability" that the intended target of the surveillance is a foreign power or an "agent of a foreign power." The court has no discretion to review or to challenge the determination that it is worthwhile to attempt to gather information from that target. While I take note of this narrow judicial role, I personally do not question its propriety in this sensitive and delicate area.

Section 2523(b) provides for appellate procedures in the event a district judge denies an application. The Chief Justice is to designate three district or circuit judges to constitute a special court of appeals. It is not clear whether this is a standing body or one that is to be specially designated on an ad hoc basis. I would urge that it be a standing body and suggest that the Chief Justice's designations of all of the judges authorized to exercise the power either to hear initial applications or to consider appeals should be made a matter of public record.

The section also provides for a "right to appeal" to the Supreme Court an affirmation of the denial of an order. A "right to appeal" is a technical term of art in Supreme Court procedure and it guarantees review on the merits. As the Committee knows, the Court itself and most commentators on the Court's jurisdiction have urged that Congress minimize the instances of what are called its "obligatory" jurisdiction and to leave more matters to its "discretionary" jurisdiction upon petition for a writ of certiorari. While the precedent of a "right to appeal" here leaves me a bit uneasy, the prospect that the Attorney General would actually have to invoke this right is an extraordinarily remote one. For this reason, I am prepared to allow the Executive Branch the right to decide that a matter is so important that, despite the failure to secure approval from one (or several) of the designated district judges or from the special court of appeals, the matter should nevertheless be pressed further.

Section 2523(c) states that the applications for these orders are to be sealed and maintained under security measures established by the Chief Justice in consultation with the Attorney General. The understandable premise is that these proceedings are to be ex parte and secret. I am hard pressed to find a parallel for ex parte, secret appeals, and I suspect that there is no parallel for such a procedure before the Supreme Court. These provisions, therefore, would be unique, and I confess to being troubled as a Constitutional lawyer and teacher of "Federal Courts" about treating further ex parte applications as "appeals." Since the inquiry that the district judge is to make is so narrow and does not really involve any fact finding or any interpretation of law, the elaborate procedures for secret "appeals" really constitute authorization simply to continue making de novo applications. In light of the Constitutional limitation on the Supreme Court's exercise of "original" jurisdiction, there is in my view a serious question about the validity of the provision for Supreme Court consideration of what is termed an "appeal" but in real, practical terms is simply a renewed application.

Nothing is said in the statute about security clearances for the judges, law clerks, and clerical staffs. At present, even when classified information is being presented to the Legislative or Judicial Branches, no such clearances are required, but I wonder whether legislation that intends to set up a comprehensive and organic system should not deal directly with this problem.

Section 2525 directs that the judge "shall enter an ex parte order" upon finding that the formal recitals are adequate and that there is "probable cause" to believe that the target is a foreign power or a foreign agent and that the facilities or place to be surveilled are being used or about to be used by the target. This raises the basic Constitutional question in the bill, namely whether Congress can Constitutionally authorize electronic surveillance of persons and places covered by the Fourth Amendment without relating the surveillance to investigation and prosecution of a crime. Throughout our history, the basic "probable cause" test has been understood as focusing on attempts to search for and seize the fruits or instru-

mentalities or evidence of criminal violations. The probable cause test therefore traditionally involves a judicial determination whether there is probable cause to believe that a crime has taken place or is taking place as well as to believe that the items to be searched for and seized are related to that crime in a certain way and are to be found at the specific location identified in the application and warrant.

Electronic surveillance for intelligence purposes is quite different. In the typical case, there may be no criminal violation involved; at the least, prosecution for a crime is not the primary objective of the surveillance. Moreover, it is likely to be difficult or impossible to specify with customary particularity the precise nature of what is to be collected. Indeed, it is almost the essence of intelligence collection by this method that it is intended to "see what can be seen" or "hear what can be heard" that may turn out to be of interest.

The Supreme Court in recent years has held that judicial warrants are not only permissible but also required for conducting various kinds of administrative inspections. In this essentially non-criminal setting, the traditional focus of the "probable cause" inquiry has been adjusted accordingly. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), and cases cited. This parallel is in my view sufficient to authorize the statutory creation of a reasonable system of judicial approval of foreign intelligence electronic surveillance.

I also consider the lines drawn by S. 3197 to be adequate for purposes of the "reasonableness" requirement of the Fourth Amendment. The class of targets is restricted to persons who are most likely to be the source of useful information. And the definition of what constitutes "foreign intelligence information" is sufficiently narrow to provide reasonable assurance that the government has a legitimate interest in the information sought. Although the court has no role in evaluating the need for the information or its character, this seems to me to be a sensible recognition of the fact that a judge is likely to lack the expertise necessary to "second guess" the Executive Branch on these questions.

The court does have some role in passing upon the reasonableness of the minimization procedures outlined in the application, and this strikes me as a proper and useful method of assuring judicial protection against wholesale and arbitrary invasions. An omission from the bill that may be significant, however, is that it does not provide for any reporting to the judge issuing the authorization, unless an extension is requested, and this makes it difficult if not impossible to have any effective judicial monitoring of compliance with the minimization requirements. I would suggest addition of a provision requiring an explanation of what occurred, to be submitted at the completion of the surveillance or periodically during its course. This process would also, over time, provide the judges involved with a fuller appreciation of the context in which they are to make these judgments.

Another feature of the bill which deserves careful attention is one that allows the court to direct any communication carrier, common carrier, landlord, custodian, contractor, or other specified person to provide "forthwith" to the applicant for the warrant "any and all" information, facilities, or assistance necessary to carry out the surveillance secretly and effectively. Although the bill would provide for compensation for the services "at the prevailing rates," Congress should carefully consider the implications of this broad power to dragoon whatever private resources seem necessary. At the very least, since this is an ex parte proceeding, the statute ought to make clear that the person so directed will have the opportunity to apply to the judge for removal or modification of his obligations.

The bill provides that the orders are not to authorize surveillance for more than ninety days, subject to an apparently indefinite number of extensions. In light of the range of activities that may be the legitimate objects of foreign intelligence surveillance, the maximum periods and the indefinite extensions seem reasonable, particularly since they are subject to judicial evaluation.

#### THE EXCEPTION FOR EXIGENT CIRCUMSTANCES

Section 2525(d) builds in an emergency provision when the Attorney General determines that it is not possible to secure a court order in time to initiate a surveillance. The provisions here are, in my view, Constitutionally and practically adequate to be justified by the "exigent circumstances" exception to the Fourth Amendment's warrant requirement. The bill provides that the Attorney General must simultaneously notify one of the seven designated judges what he is doing and that the surveillance must terminate within twenty-four hours unless a judge has approved a formal application within that time.

## LIMITATIONS ON USE OF INTERCEPTED INFORMATION

A new provision added to Section 2525(d) by the Judiciary Committee would render inadmissible in court and unavailable in any other government proceedings, including Congressional investigations, the results of any emergency surveillance which terminates prior to the issuance of a court order or for which an order is finally refused. I believe that exclusion sweeps too broadly. The expiration of a surveillance or even the refusal of an order does not imply that the emergency action taken under the direction of the Attorney General was unlawful at the time. It is a general principle of American law that all probative evidence lawfully obtained by the Government should be admissible in official proceedings. This applies, for example, to evidence seized without a warrant because the investigating officer believed in good faith that he had probable cause for the search and seizure and that exigent circumstances made it impossible to obtain a warrant. I would suggest that such a standard of admissibility be incorporated in S. 3197, not an automatic prohibition based simply on the absence of a later order of approval.

Section 2526 contains other, very general limitations on the use of the information acquired after a judicial order authorizing a surveillance has been obtained. Basically, the information may only be "used by and disclosed to" federal officers and only for foreign intelligence purposes or the enforcement of the criminal law. The language of the original bill was changed by the Judiciary Committee to the phrase "used by and disclosed to" federal officers. To the extent this change has the objective or effect of preventing disclosure to foreign intelligence services or state criminal law enforcement officers it may sweep too broadly.

The bill specifically makes evidence obtained in the course of an electronic surveillance or derived from it admissible in any judicial proceedings in the state or federal courts, but only under certain conditions. The Judiciary Committee chose to amend the original bill to follow the pattern set by Section 2518(9) of Title III of the 1968 Organized Crime Control Act. That provision requires that, in advance of any use, the parties to the proceeding be given a copy of the court order and the accompanying application relating to the interception. Proposed Section 2526(c) would not automatically go that far, however. Prior to the use of the fruits of a foreign intelligence surveillance, the Government would have to notify the court of the source of the evidence. The court then would determine, in camera and ex parte, whether the surveillance was authorized and whether there was any constitutional or statutory violation of the rights of the person against whom the information is to be used. The court may make certain disclosures to the interested party if it finds it would be useful and if it discounts any danger to "national security."

This procedure strikes me as a fair accommodation of the respective interests at stake. The Government obviously has a legitimate interest in the confidentiality of the background of certain foreign intelligence surveillances, and for diplomatic reasons may be under substantial pressure not to acknowledge—formally—even the fact of those surveillances. The accused's interests can be adequately protected, I believe, by an ex parte determination of the lawfulness of the acquisition of the information, and the Supreme Court has so held.

Of perhaps controlling significance in this context are two Supreme Court decisions expressly addressing the procedures required by the Constitution for dealing for foreign intelligence electronic surveillance. In the *Alderman* case in 1969, the Court had held that the defendant in a criminal trial is constitutionally entitled to an adversary hearing to litigate the relevance to his prosecution of logs of his conversations that may have been illegally intercepted. Shortly thereafter, however, in *Giordano v. United States*, 394 U.S. 310 (1969), and *Taglianetti v. United States*, 394 U.S. 316 (1969), the Court made it clear that an adversary hearing became necessary only after a threshold finding of illegality had been made by the court and, significantly, held that there is no constitutional bar to the court's making the determination of the legality of a particular foreign intelligence electronic surveillance in camera and ex parte. In *Taglianetti* the Court explained that it was unwilling to regard that task as "too complex, and the margin of error too great, to rely wholly on the in camera judgment of the trial court." 394 U.S. at 318. I regard this as a clear indication that the ex parte fact-finding function performed by a district judge in determining the lawfulness of a foreign intelligence electronic surveillance is sufficiently fair and reliable to comport with the requirements of due process.

One point here deserves some careful consideration. Under Section 2526(c), as I read it, if the fruits of the foreign intelligence surveillance are to be used in a state proceeding—probably a rare occurrence—it is the state judge that must make the ruling. Although that arrangement seems logical and is in accord with the symmetry of our federal system, I question the wisdom of involving state judges in what are likely to be sensitive matters relating to national defense.

In the same section dealing with the use of information, the bill provides in Section 2526(e) for notice to the target of an electronic surveillance only in one situation, and that is optional. A report is to be given only where an emergency surveillance has been conducted without a prior order of approval and where no subsequent judicial ratification has been given. Even in that instance, the judge may defer the notice for one period of ninety days, and thereafter, on a further ex parte showing, may forego ordering notice to be given at all. In light of the diplomatic sensitivity of this area, this procedure too seems to me to provide a reasonable degree of flexibility to the court. Although under traditional law, including Title III wiretaps, see 18 U.S.C. § 2518(8)(d), notice to the target of a search and seizure is mandatory, this practice is not constitutionally required and I can see why it would not ordinarily be appropriate in the gathering of foreign intelligence.

#### THE POSSIBLE MOTION TO SUPPRESS

Section 2526(d), as added by the Judiciary Committee, is a provision that seems deceptively sensible. In my view, however, the provision is at best pointless, and at worst mischievous. This is a new provision authorizing a person against whom the fruits of a foreign intelligence surveillance have been or are about to be used in any kind of official proceeding at any level of government to move to suppress that information.

I consider this provision pointless since Section 2526(c) imposes an affirmative obligation on the Government to report the potential use of these fruits to the court that will be asked to receive the evidence. Moreover, it will be the rare case in which the subject of a foreign intelligence surveillance will be aware of that fact. This suggests why this provision may lead to considerable mischief. I recall that in the period after the *Alderman* decision by the Supreme Court in 1969, it became fashionable—indeed routine—for defendants in criminal cases to demand that the Government search its files to see if they had ever been overheard in an electronic surveillance. Naturally, the overwhelming number of these demands were baseless, but they considerably burdened the Government. I can easily conceive the civil suits being filed under the rubric of Section 2526(d) demanding suppression without any solid basis to believe there is anything to be suppressed. Since the proposed procedure is presumptively ex parte anyway, once the motion is filed, I suggest that Section 2526(c) adequately covers this problem by placing a burden on the Government to initiate the judicial review when there has actually been a surveillance and it proposes to use the fruits.

#### ANNUAL REPORTS ON SURVEILLANCES

Section 2527 requires reports on the number of authorizations, extensions, and denials to be made to the Administrative Office of the United States Courts and to Congress, along with information on the periods for which applications were authorized and for which surveillances were actually conducted. Significantly, however, nothing is said about any description of the nature of the surveillances conducted, even in the most general terms. And nowhere in the bill is there any requirement that the Executive advise the issuing courts of the conclusion of the surveillances. Without at least in camera briefings for the judges involved and for the interested Congressional committees, it will be quite difficult to assess how the system is functioning.

#### THE RESERVATION OF PRESIDENTIAL POWER

The last substantive section of the bill, Section 2528, deals with one of the most difficult and vexing issues in this area: to what extent does the President have inherent power to authorize electronic surveillances in national security cases without a warrant, and what if anything should Congress do about such power?

The bill as originally introduced provided an open ended reservation of alleged presidential power to order electronic surveillance in situations outside the contours of the bill. I opposed that formulation as an invitation to abuse. As sub-

stantially revised by the Judiciary Committee, however, Section 2528 takes a somewhat more careful approach. The Judiciary Committee draft would repeal the current reservation contained in Section 2511(3) of Title III, which has been the source of considerable confusion and, I believe, some abuse. The new Section 2528 provides, in sum, that neither Title III of the Organized Crime Control Act, nor Section 605 of the Communications Act, nor the bill itself affects "any" constitutional power the President "may have" to gather foreign intelligence under certain circumstances. The non-committal—almost skeptical—terms "any" power that the President "may have" are well chosen to avoid giving unintended congressional support to the concept of inherent Executive power.

The circumstances in which this inherent power may exist, according to Section 2528, are basically two: The first is where the acquisition does not fall within the definition of "electronic surveillance" contained in the bill. As I have previously discussed, the coverage of the bill is geographically limited, and does not extend, for example, to the interception of wire communications if the interception takes place outside the territory of the United States, or to the interception of international radio traffic. I confess to being somewhat puzzled why these types of electronic surveillance should be left in a legislative and Constitutional limbo outside the ambit of the bill.

The second area of possible reserved power is keyed to circumstances termed "so unprecedented and potentially harmful to the Nation that they cannot be reasonably said to have been within the contemplation of Congress" in enacting this bill or Title III. I consider this provision a meaningless tautology. If the circumstances are so gravely unique that no one could "reasonably" consider them covered by Congressional requirements, then of course—by definition—the bill would not affect them. And I might add that, even if the bill tried to do so, no President would view himself as constrained by statutes designed for more prosaic events.

I remain at a loss to understand why the Administration remains so insistent on some form of reservation of Presidential power, even a meaningless one. Even the narrow reservation now embodied in S. 3197 seems to me to promise more risks than its terms justify. It is the function of statutes to deal with the ordinary and foreseeable. We all know, however, that there can be extraordinary and unforeseeable events that should not be covered. But in my judgment when the law goes beyond plain and flat statements of general principles and includes its own declaration of inapplicability, then it undermines what should be the norm and invites a more generous interpretation of the exemption. For this reason, I oppose inclusion of Section 2528, even in its present form. It may be politically expedient to finesse the question of reserved power, but this is too important a subject for equivocation.

#### CONCLUSION

With the changes I have suggested, however, I support passage of S. 3197.

#### APPENDIX TO STATEMENT OF PHILIP A. LACOVARA ON S. 3197

##### CHECKLIST OF POLICY AND PROCEDURAL DECISIONS REGARDING USE OF ELECTRONIC SURVEILLANCE TO OBTAIN FOREIGN INTELLIGENCE INFORMATION

1. Should electronic surveillance be allowed in non-criminal investigations?
  - (a) "Foreign intelligence" collection;
  - (b) "Domestic security" investigations; and
  - (c) Other government policy planning and information gathering activities.
2. At what stage should electronic surveillance be permitted in "foreign intelligence" gathering?
  - (a) As alternative to other techniques of information gathering; and
  - (b) Only upon determination that other techniques are ineffective or unsuitable.
3. For what type of information should electronic surveillance be used?
  - (a) National defense information:
    - (i) Of exceptional importance to U.S. military security;
    - (ii) Of importance to military preparedness; and
    - (iii) Of relevance to military policy.
  - (b) Foreign policy information:
    - (i) Diplomatic and political intelligence;
    - (ii) Economic and trade information; and
    - (iii) Social and cultural information.

4. Should judicial warrants be required?
  - (a) For all uses of electronic surveillance;
  - (b) For all surveillances except under exigent circumstances; and
  - (c) For all surveillances except those directed against particular persons or premises (e.g., foreign government representatives).
5. Who can be made the object of an electronic surveillance?
  - (a) Foreign nationals accredited as representatives of a foreign government or organization:
    - (i) Of any nation; and
    - (ii) Of potentially hostile nations.
  - (b) Nonresident aliens not accredited as per (a); and
  - (c) Resident aliens.
  - (d) United States citizens:
    - (i) Holding sensitive government positions;
    - (ii) Holding any government position; and
    - (iii) Of any type, including journalists, professors, etc.
  - (e) "Foreign agents" irrespective of citizenship:
    - (i) In regular paid service of foreign government; and
    - (ii) In regular contact with representatives of foreign government.
6. What level of belief in existence of justification will suffice?
  - (a) Probable cause;
  - (b) Suspicion; and
  - (c) Possibility.
7. Who in the Executive Branch should have the authority to determine whether electronic surveillance should be sought?
  - (a) The President personally;
  - (b) The Attorney General personally;
  - (c) The Secretary of State or Secretary of Defense; and
  - (d) A delegate of any of the foregoing (if appointed by the President and confirmed by the Senate).
8. What documentation for the proposed surveillance must be made and maintained by the Executive?
  9. Who can approve judicial warrants?
    - (a) Any United States magistrate;
    - (b) Any United States district judge;
    - (c) Any United States circuit judge;
    - (d) Any Supreme Court Justice; and
    - (e) Specially created court.
  - (f) Specially designated judge or Justice:
    - (i) Designated by the President; and
    - (ii) Designated by the Chief Justice.
10. What review will be allowed of the denial of an application?
  - (a) By successive application to other judges; and
  - (b) By appeal.
11. What security arrangements are appropriate regarding applications?
  - (a) Papers; and
  - (b) Security clearances for judges, law clerks, clerical staff.
12. Who should be authorized to execute surveillance warrants?
  - (a) Any federal law enforcement officer;
  - (b) Only Federal Bureau of Investigation; and
  - (c) United States intelligence agents.
13. What restraints should be applicable to the conduct of an electronic surveillance?
  - (a) Supervision by Justice Department lawyers;
  - (b) Minimization of overhearing and recording of nongermene information; and
  - (c) Termination prior to expiration of warrant for lack of positive results.
14. Should renewals of the surveillance warrant be allowed?
  - (a) On same level of showing of justification as originally applicable;
  - (b) Upon more compelling showing of probability of results; and
  - (c) Upon certification or demonstration of concrete results to date.
15. Should the number of renewals or the maximum period of electronic surveillance be fixed?
  - (a) Possible differences among types of persons (accredited foreign representatives vs. U.S. citizens) or premises (official vs. residential); and
  - (b) Indefinite monitoring permissible.
16. Are there circumstances under which the subject of an electronic surveillance should be notified of that fact?

- (a) If a warrantless emergency tap was not later ratified;
  - (b) If an authorized surveillance was conducted but yielded no positive results; and
  - (c) If U.S. citizens are involved.
17. What sort of reporting requirements are desirable on the nature, number and results of electronic surveillance?
- (a) To the court issuing the warrant; and
  - (b) To the Congress.
18. What information may permissably be retained and/or disseminated?
- (a) Foreign intelligence information;
  - (b) Information regarding violations of domestic criminal laws; and
  - (c) Other background information on government officials, business, civic, labor, or religious leaders.
19. What will be the scope of applicability of the "foreign intelligence electronic surveillance" standards and procedures?
- (a) Only to off-premises taps of telephones;
  - (b) Surreptitious entries into premises to install listening devices and transmitters;
  - (c) Surreptitious entries to copy or seize documents containing foreign intelligence information; and
  - (d) Use of remote listening devices (e.g., parabolic microphones, microwave sensors, etc.).
20. Will the standards and procedures apply outside the United States and its territories to:
- (a) United States citizens;
  - (b) Resident aliens traveling abroad; and
  - (c) United States corporations.
21. What sanctions are appropriate for non-compliance with standards and procedures, willfully or nonwillfully?
- (a) Criminal prosecution;
  - (b) Civil liability; and
  - (c) Administrative discipline.

Mr. HEYMANN. With Herman Schwartz's indulgence, then, I will go next, Mr. Chairman.

Senator BAYH. Fine.

If I might ask all of your indulgence, I have a sort of worn out burger that I would like to munch on. I do not see any time in the next 2 or 3 hours when I might excuse myself to eat. So, if you will forgive me, I will try to keep my lips closed while I am chewing.

Mr. HEYMANN. As long as you give me equal attention with the burger, I will be delighted.

Senator BAYH. I promise to chew only on the burger.

[General laughter.]

Mr. HEYMANN. Mr. Chairman, I asked Herman if I could go next because I wanted to make an opening statement that responds rather directly to the approach of the American Civil Liberties Union in this case. By the way, I, too, would like to submit my written statement for the record, and in that way I can keep it shorter and a little bit more focused as we go along.

[The prepared statement of Mr. Heymann follows:]

#### PREPARED STATEMENT OF PHILIP B. HEYMANN

Mr. Chairman, members of the committee: I appreciate the opportunity to appear before you to testify on S. 3197. I am aware that there is substantial, honest debate about the desirability of the bill. This should be hardly surprising. The area of wiretaps and electronic surveillance is one on which liberals and conservatives have divided for almost three decades and is one in which the proper role of the executive, the legislature, and the judiciary has never been agreed upon. I believe that you have before you a highly unusual, not soon-to-be-repeated, opportunity to clarify and indeed resolve these debates of thirty

years. I fear that it will not soon be repeated, and therefore, with certain recommendations that I shall make, urge you to report the bill favorably.

The only realistic way to approach the broad question of whether a bill similar to this, with various amendments, should be passed is to compare the situation if the bill is passed with the law as it is and is likely to be without the bill. It is useful to consider three categories of protection involved in any search and in particular as they might be involved in the case of electronic surveillance. First, there is the question whether judicial authorization should be required as a check on the excessive enthusiasm or occasional bad faith of the executive branch. That of course is the warrant question. Second, there is the question of the circumstances under which surveillance is authorized: more particularly, whether or not it must be shown that the surveillance is likely to produce evidence of a crime. Third, there are a variety of protective procedures and remedies that are generally applicable to searches and more specifically made applicable to electronic surveillance under the Omnibus Crime Control and Safe Streets Act of 1968.

Let me run through each of these in turn comparing the law as it now is in the foreign intelligence area with the provisions of S. 3197. First, the requirement of a judicial check in the form of a warrant. For almost thirty years the executive branch has claimed, without substantial rebuttal by either the legislature or the judiciary, an inherent power to engage in electronic surveillance for foreign intelligence purposes without a warrant and thus without any of the protections that judicial review can provide. The Congress has never been willing to confront this question: When it passed the 1968 statute, it expressed a studied neutrality on the propriety of such executive action either in the foreign intelligence or the internal security field. The claim has been litigated before the courts only in comparatively recent years. In *United States v. District Court*, the Supreme Court held that, where there are no foreign intelligence aspects, the executive claim to proceed without a warrant on internal security grounds fails. Since *Keith*, three Courts of Appeals have addressed the question in the area of foreign intelligence. Two of them, which to the best of my knowledge were dealing with alien representatives of a foreign power, sustained the President's power to act without a warrant. The third and most recent decision, *Zweibon v. Mitchell*, had a plurality of the Court of Appeals of the District of Columbia suggesting that a warrant *might* be required for electronic surveillance even of foreign agents but finding it unnecessary to reach that question.

S. 3197 represents a belated but welcome recognition of the fundamental role of the Congress in resolving this question of the balance between foreign intelligence needs and civil liberties. For the first time the entire area of government wiretapping would be regulated by statute; the gap left by the 1968 statute would be filled. A warrant is required in all cases with the sole exception of a disclaimer clause which is, I believe, so narrowly defined as to preserve only the possibility that in wholly unanticipated circumstances the President may retain an extremely limited inherent power, at least until the Committees on the Judiciary of the Senate and the House have an opportunity to recommend legislation to deal with the unanticipated situation. In this way one of the great Constitutional disagreements that have infected the area for decades is finally laid to rest. The President's claim of inherent power is neither accepted nor rejected by Congress, but it is cut down with his consent to the point of dealing only with situations that Congress did not contemplate and only then if great harm to the nation is the prospect if he fails to act. I believe the disclaimer clause is entirely safe in its limitations. It finally imposes the rule of law on decades of executive discretion.

Before leaving the disclaimer clause, I would like to mention the provision that limits the coverage of this bill to purely domestic surveillance activities. I believe the Judiciary Committee followed an entirely sensible process in dealing with that aspect of this troublesome area without going into the very complicated refinements involved in monitoring overseas mail, overseas communications by wire or radio, and surveillance that takes place completely in a foreign country. But that was a decision of sensible convenience. The hearings before the Senate Select Committee on the activities of the C.I.A., the F.B.I., and the N.S.A. with regard to communications between persons within the United States and those without the United States, provided striking evidence of the need for legislative standards in this area as well. I urge the Senate Intelligence Committee to proceed with hearings and to report out a bill designed to handle the important matters and the huge volume of communications that were left for a later date when S. 3197 was drafted. It is very important work, indeed.

The second question—what are the circumstances in which surveillance is proper—presents the hardest unresolved issue in S. 3197. The bill does not require



the judge to find that there is probable cause that evidence of a crime will be obtained by the surveillance. For American citizens or resident aliens it requires a finding that the person is acting "pursuant to the direction of a foreign power"—a substantial protection—and is also "engaged in clandestine intelligence activities, sabotage, or terrorist activities." In part, this definition reflects the fact that the fundamental purpose is obtaining or protecting foreign intelligence, not discovering evidence of a crime. But the price of this definition in terms that do not depend upon clearly defined criminal statutes is a certain unfortunate measure of uncertainty for citizens who are acting pursuant to the direction of a foreign power and of continued discretion for the executive branch, now necessarily operating with the concurrence of a judge. The notion of a search without probable cause of a crime is not, of course, unprecedented. Border searches, airport searches, housing searches are all conducted in this context—sometimes with a warrant requirement, at other times without. But the vagueness of the definition remains troublesome.

Let me begin my discussion of this provision by trying to describe as accurately as I can where the law is now on the subject of the circumstances justifying a foreign intelligence search. When the Supreme Court decided in *United States v. District Court* that a warrant was required for electronic surveillance justified by internal security needs with no foreign connections, it hinted rather broadly that the Constitution would permit surveillance in this situation without showing the probability that evidence of a crime would be discovered. Of course the two Courts of Appeals (the Third Circuit in *United States v. Butenko*, 494 F. 2d 593 and the Fifth Circuit in *United States v. Brown*, 484 F. 2d 418) that decided that no warrant was required for foreign intelligence surveillance of alien agents of a foreign power implicitly abandoned the requirement of probable cause of a crime in the same situation. Finally, the Court of Appeals for the District of Columbia in *Zweibon v. Mitchell* suggested rather clearly that the Constitution would permit electronic surveillance in the foreign intelligence area, even of those who were not alien agents of a foreign power, without the traditional showing of probable cause of a crime. The District of Columbia Court did, however, impose additional obligations which were intended to substitute for the traditional requirement.

In very important ways S. 3197 is a major advance on this prior law even in the area of the circumstances justifying a search with judicial approval. The requirement that the judge find that the person subjected to surveillance have acted "pursuant to the direction of a foreign power" would, if applied in good faith, end the specter of such taps as those President Nixon imposed on members of the staff of his own National Security Council and those that have been imposed by several Presidents on political opponents and reporters. Moreover, extremist political groups of the left and right would be secure from electronic surveillance unless they were either involved in criminal activity or acting pursuant to the direction of a foreign power. When one recognizes that the most important consideration bearing on the executive's power to engage in electronic surveillance is the threat that it poses to First Amendment rights and political opposition, it is no small accomplishment that the present bill would eliminate almost all of the flagrant abuses that have occurred in recent years.

Still, neither the fact that searches without probable cause of a crime are justified in other circumstances, nor the history of judicial tolerance in this area, nor the plain benefits of the bill if it is limited in good faith to people who are reasonably believed to be acting pursuant to the direction of a foreign power quite silences my doubts about the language "clandestine intelligence activities." The wording of Section 2521(b)(ii) is obviously ambiguous in two regards. First, "clandestine" is intended to suggest wrongdoing but literally means only secret. Second, what is to be secret as a condition of electronic surveillance could be any of three things: the direction of the foreign power, the fact that one is engaged in intelligence activities, or the nature of the information that is being sought by the person.

The problem here involves two types of persons that might find themselves ensnared in these surveillance provisions. First there is the admitted foreign agent, the lawyer who has been registered as representing a foreign government. Suppose his client asks him to pick up, discreetly, public information from the annual reports of a number of American companies in a particular industry, for example, tire manufacturers. It seems clear to me that he should not be subject to electronic surveillance, although the fact that he is collecting public documents is secret. I think the country has worked and can continue to work on the assumption that any information that is made widely available to the public can be and is being

collected by foreign governments. Thus, if the only thing that is secret is that the person working for a foreign government is in fact collecting publicly available information for that government, there is no basis for electronic surveillance. The secrecy, to justify electronic surveillance, would have to go either to the relationship with the foreign power or to the nature of the information collected. The next step is to ask whether it is sufficient basis for electronic surveillance that a person has not disclosed that he is acting pursuant to the direction of a foreign power. Here the type of individual who will fear electronic surveillance under the present provision is one who may be carrying out the request of a foreign government in obtaining publicly available information or one who simply has a variety of friendly contacts with some representative of a foreign government and is suspected of working under the direction of that government in obtaining publicly available information. Here, too, it seems to me that the case for electronic surveillance fails. One cannot say that our government has no interest in what information foreign governments are collecting. But the interest is relatively small, and the dangers of including this category are very great. The fact that an American citizen is collecting publicly available information has no evidentiary value whatsoever. Thus, to allow electronic surveillance whenever there is reasonable suspicion to believe that he is engaged in this activity "pursuant to the direction of a foreign power" leaves open the real possibility of electronic surveillance whenever the citizen has had any significant contacts with representatives of a foreign government. I simply believe the benefits of including this category are far outweighed by the risks.

Thus, we are left with only one strong case for the application of the term "clandestine intelligence activities"; where the person acting pursuant to the direction of a foreign power is engaged in collecting information which is meant to be kept secret by this government, other governments, or private industry. If that information bears on the national defense, the individual would be engaged in espionage. But if the information does not, there would be no crime committed. It seems to me that the fact that an individual knows he is obtaining unauthorized access to information as to which he knows there is a legitimate claim of secrecy provides sufficient warning that, if he is acting pursuant to the direction of a foreign power, he may be subjected to electronic surveillance. Our government could doubtless survive handily without being able to search in this situation unless a crime was being committed. But the risks of abuse are substantially reduced. I thus suggest that the language of Section 2521(b)(ii) be amended to read "a person who, pursuant to the direction of a foreign power, is engaged in collecting secret information, sabotage, or terrorist activities. . . ." This will precisely track the meaning that any ordinary reader would give to the section as it is now written. But it will eliminate the ambiguities that are built into it at present. Included in these ambiguities are the possibilities that an American could be subjected to electronic surveillance if it was believed that he was acting pursuant to the direction of a foreign power and was secretly engaged in other activities which are not criminal but which fall within the category of "dirty tricks." Again, it seems to me that there is a legitimate governmental interest here but that it is too slight, absent illegal conduct, to warrant the risks to forms of legitimate dissent by those who may have loose contacts with representatives of foreign governments.

There is a procedural protection that I would attach to this subsection whether or not the minor amendment I have just proposed is adopted. The vagueness of the non-statutory terms "clandestine intelligence" and "terrorist activities" can be substantially reduced by a proviso that would read:

Provided that in any case where the activities of the person are not in violation of the laws of the United States or of the state in which they occur, the Attorney General shall, within a reasonable time after obtaining an order authorizing electronic surveillance, transmit to the Committees on the Judiciary of the Senate and House of Representatives, under written injunction of secrecy if necessary, a statement setting forth the nature of the facts and circumstances justifying the surveillance.

This will provide a substantial guarantee that the uses of the vaguely worded power are in conformity with the intent of Congress and will provide a continuing record on the basis of which the law can be made more specific at a future date. I am not opposed to the notion of a two-year limit on electronic surveillance where no crime is involved. The fact of the matter is that almost all of the examples that have ever been cited by the Attorney General involve a violation of state law if not of federal law. But I do believe that the requirement of a continuing report either to the Judiciary Committees or to the Intelligence Committees will

provide the basis for later legislation as well as a check during the ensuing period. Needless to say, such a procedural protection is doubly necessary if there is no amendment to the present language of Section 2521(b)(ii).

I will try to be brief in dealing with the third question: the adequacies of the procedures set forth by the bill. I believe that three of these have been questioned and deserve comment.

1. The Omnibus Crime Control and Safe Streets Act of 1968 requires a judge to find probable cause to believe that relevant communications will be obtained through the interception proposed; in that case, evidence of one of the enumerated crimes. S. 3197 simply requires a certification by a high executive official that the purpose of the surveillance is to obtain the relevant foreign intelligence information. I do not think the distinction is important. A judge is unlikely to exercise an independent judgment on this question in any event. If he wishes to exercise an independent judgment, he is invited to by means of the minimization provisions under the present bill. The crucial thing for the judge to decide is whether the citizen is acting pursuant to the direction of a foreign power and is engaged in well-defined activities. If he has found this and has exercised a responsible judgment in insisting on minimization, there is not much to be gained by requiring him to reach a conclusion that particular communications will in fact be obtained. I do agree with the American Civil Liberties Union that the minimization procedures could be defined more tightly, particularly with regard to "the conduct of foreign affairs," though I am not hopeful that this would make much difference.

2. Judges, too, can be lazy and irresponsible. They can also defer in a subservient way to reckless executive action. Some check on this is provided in the 1968 Act by the requirement that an individual who is the subject of surveillance be given notice within ninety days of that fact unless the judge decides to postpone the notice for good cause. There are obvious difficulties with this solution in the field of surveillance for foreign intelligence purposes and thus S. 3197 contains no such provision. But a safe and acceptable substitute, providing many of the benefits of notice, would be accomplished by an amendment that I understand this Committee is already considering. The Intelligence Committee should be entitled to request the application papers, the court orders, and at least a summary conclusion of the results of surveillance from the Attorney General when surveillance is conducted under S. 3197 and involves citizens or permanent residents of the United States. At present, as I understand it, there is no electronic surveillance being conducted on an American citizen on grounds of foreign intelligence in the absence of probable cause of criminal activity. Thus, the volume that may be involved here will be very small. The Intelligence Committee can without difficulty maintain a continuing check on the way the statute is being used with the resulting benefits of both preparing itself for any necessary amendments and providing needed assurance to American citizens that there is some check on the risk of too complacent judicial acquiescence in expansive Presidential use of these new powers. The Senate Intelligence Committee will be receiving far more sensitive information than this and will be expected to maintain necessary secrecy. Thus, there should be no national security objection to such oversight. I do not believe that there is a substantial privacy objection if the transcripts of conversations are not sought. If there is a privacy objection to the release of the application, arrangements can be made for deletions of the name of the subject.

3. It is the general rule that evidence of a crime discovered in a search legally made for other purposes can be used at trial. Thus, I have no objection to this provision in S. 3197. I do think that a one-word change would be desirable in Section 2526(c). Under the 1968 Act, before evidence derived by electronic surveillance can be used against a defendant in a criminal trial, he must be furnished with a copy of the court order and accompanying application under which the interception was authorized or approved. Because of the sensitivity of such documents where what was sought was foreign intelligence, it makes very good sense to eliminate this provision and allow the court to make a judgment without the assistance of the defendant so long as the legality of the surveillance is reasonably clear. If, however, the legality is in doubt and the defendant's assistance "would substantially promote a more accurate determination of the legality of the surveillance," I believe that the judge should call upon the defendant to assist in making this determination, and that requires furnishing a copy of the order and application or some reasonable substitute for it. If this would endanger the national security, the government should of course not reveal it; but then neither should it use the evidence at a criminal trial when there remains substantial doubt as to the legality of the surveillance. This is the rule suggested by such cases as *McCray v. Illinois*, 386 U.S. 300, which recognizes the

right of the government to keep secret the name of an informer at a hearing on a motion to suppress unless revealing such information is essential to an accurate determination of the legality of the search. Thus, the last sentence of Section 2526(c) should authorize the judge to disclose the order and the application only if he "finds that such disclosure would substantially promote a more accurate determination of the legality of the surveillance or that such disclosure would not harm the national security."

In conclusion, Mr. Chairman, I want to express again my view that S. 3197, with minor modifications, will constitute a landmark in the protection of civil liberties within the United States. It will provide needed reassurance that political dissent is not dangerous while preserving the legitimate concerns of our national security. It will go very far indeed toward silencing the fears that many feel when they hear a suspicious click on the phone. It will close a gaping hole in the charter of American rights in the area of search and seizure. It will represent a long-awaited assumption of legislative responsibility for reconciling the claims of national security with those of civil liberties. Thank you.

Mr. HEYMANN. This is an occasion on which the Senate Select Committee, like the Judiciary Committee, has to feel a real sense of responsibility.

No matter what the American Civil Liberties Union, of which I have been a member as long as I can remember, says, this is an issue on which liberals and conservatives have been deeply divided for three decades. This is an issue on which the executive, the legislative, and the judicial branches have been divided for three decades. It will be a remarkable achievement if a constructive, permanent—by permanent I mean something that lasts for years, 10 years—solution comes out of this. To knock the Senate Judiciary Committee for the steps it has taken so far, to treat them as hypocritical or false, is to play an unfair role, I believe. Let me spell that out and then I will get to what I think are the difficulties in the statute, and I will discuss them one at a time.

The only realistic way to approach this statute is with an eye in mind both to what the law is now and what are the legitimate claims of different branches and different political parts of the spectrum, from left to right. I am not satisfied with the bill as it is now, and therefore I am delighted this committee is going on with these hearings. I would bet very strongly that a better bill is going to emerge.

But to suggest that this is not the occasion for producing such a bill, to suggest that we are in an "on or off" situation and that the answer is off—no bill—is simply irresponsible. Let me see if I can substantiate that instead of simply alleging it.

There are three, basically three parts of any search doctrine, and the last is something of a catchall. There is the requirement, or non-requirement of, judicial approval as a check on either excessive executive enthusiasm or bad faith. That is the warrant requirement. There is definition of the occasion on which a search, or in this case an electronic surveillance, can take place with or without a warrant. In this case that is the question of should there have to be probable cause of a crime, the most substantial question before the committee. Finally, in any search situation there are a set of procedures that are very important. They involve notice, exclusionary rules, criminal penalties, civil remedies, and I will discuss those last, looking only at three of them. But as I go through, I want to make the point that the Senate Judiciary Committee has already brought the Senate, and I hope the country, a very long way, and I hope you take us a little bit further.

Let me run through this in terms of the law as it stands. For almost 30 years the executive branch has claimed, without substantial rebuttal by either the legislature or the judiciary, an inherent power to engage in electronic surveillance in the area of foreign intelligence. I was one of the four-man team in the Watergate prosecution of John Ehrlichman for breaking into the office of Ellsberg's psychiatrist. I handled the appeal for the Watergate Special Prosecutor. I have been over those cases and I know the claims that have underlain it over time.

The Congress has never been willing to confront this question before. In the 1968 act it took a studied position of caution, saying whatever the law may be with regard to foreign intelligence or domestic security, we are not changing it—we are doing nothing about it. The claim has been litigated, the strong executive claim to do what it wants in the area of foreign intelligence has been litigated only in recent years. It was litigated first in the *Keith* decision, *U.S. v. District Court*. There the Supreme Court struck down the claim to search without a warrant, and I am going to start by focusing on the warrant part, for internal security, and reserve the question of foreign intelligence.

Since then three courts of appeals have addressed the question. The fifth circuit and the third circuit have sustained the Executive claim in cases which, to the best of my knowledge, and there is no way of knowing more, involve alien agents of a foreign government, what we would really call a foreign agent in every sense of the word. The third court was the District of Columbia Circuit, in *Zweibon v. Mitchell*, in which case the plurality of the court went moderately far toward hinting that they might require a warrant, even in the case of a foreign agent. They required a warrant in the case of the Jewish Defense League, which was not an agent of any foreign government or collaborator.

Now along comes this bill, against that uncertain background, and in the warrant area it plainly requires, it plainly covers the waterfront of electronic surveillance in the country, now requiring a warrant for any criminal surveillance, for any foreign intelligence surveillance, for any claim of domestic intelligence surveillance. The warrant is required in all cases, with the sole exception of a disclaimer clause, which could be better written but which seems to me to be 100 percent safe, if not an empty basket. The disclaimer clause as it is written in this bill resolves finally the President's long—30-year—claim that he has an inherent power by saying to him not what the American Civil Liberties Union says: "Yes, we in the Senate and we in the Congress recognize that you have that power," but saying to him, "We make no judgment on what power you may have, but we say that whatever it may be, it is no broader than the infinitesimally small point which is something that was never contemplated by the Congress in passing this bill and something that is of grave danger to the country."

Now the language should be closer to grave danger than it is. But at a minimum it requires something never contemplated by Congress. Then having said to the President that you have no inherent power to act without judicial authority in any area, except in that infinitesimal area, the "uncontemplated by Congress" situation, it goes on and it says, and if you do that, you have to report immediately to the House

Judiciary Committee and the Senate Judiciary Committee. The bill as it emerged covers the waterfront with a warrant and does nothing but preserve the symbolic, tiny, tangent point, with protection surrounding that, for the President's 30-year adamant claim of inherent power.

OK. Before leaving the disclaimer clause I would like to say one thing about the part, reserves overseas wiretapping, the operations of the NSA, the mail operations of the CIA and the FBI. There is every good reason to pass this bill without handling those very complicated matters at the same time. But this Committee, the Senate Select Committee on Intelligence, ought to go rather directly to those matters. The hearings before the Select Committee indicated that there are fourth amendment violations going on in large numbers, numbers that probably dwarf anything we are talking about in this bill, with regard to overt transmissions from the United States to a foreign country or the other way, from a foreign country to the United States. There is also the question of mail.

There is also the question of searches and seizures totally within a foreign country by American agents. The Committee has a responsibility to go to that and to go to that promptly. This bill cannot be an excuse for not going promptly to that, but it is not written as if it were an excuse.

Senator BAYH. Would you comment while you are on that on the distinction, which it seems to me we should at least reasonably consider, between abuse of the citizens' rights en masse abroad, through certain mass techniques, which at least this Senator understands does not have as a mission a selecting out of Citizen Doe or Roe—would you distinguish between that type of activity and the kind of activity that involves selecting out one citizen abroad and then violating his or her rights in a very personal way?

Mr. HEYMANN. I went over this, as you may know, Senator, with the Select Committee at a previous time when the Attorney General also testified. I have no difficulty saying that selecting out an individual, either overseas, or an individual's transmissions between the United States and abroad, is a much more troubling and serious matter than any collection that does not involve individuals, but even the latter may require regulation. The Committee report has, I believe, interesting proposals throughout that area of National Security Agency monitoring, and it is a very serious problem. I just think there is no way to complain about that not being in this bill, which is hard enough and complicated enough as it is, and important enough to grab when the time is right.

All right. The second area that any search and seizure question involves is the area that is troublesome in this bill, and that is: What is the occasion that permits the search or permits the electronic surveillance? Now we have gotten as far as saying that whatever it is that will permit it, the judge has to find it as well as the Attorney General, or the Acting Attorney General if the Attorney General is absent. But what is it that you have to find? The bill before you does not require the judge to find that there is probable cause that evidence of a crime will be found. That is what is generally required for a physical search. That is what is required under the 1968 Omnibus Safe Streets Act, that they find there is probable cause to believe that evidence of a crime will be found.

The bill, as you know very well from all the testimony, requires a finding that an American citizen—I am just going to focus on American citizens or resident aliens—is one, acting pursuant to the direction of a foreign power; and two, engaged in certain ill-defined activities—that is my description—clandestine intelligence activities, sabotage, that is a statutory crime, or terrorist activity which is not a statutory crime. The first and the third are not. The definition, as the Attorney General explained this morning, reflects the fact that the fundamental purpose that the Executive has in mind in wanting foreign intelligence surveillance is not discovering evidence of a crime or punishing a crime. It is to pick up positive, or I suppose, counterintelligence information by tapping in—and I use the word tapping with its double meaning—into what the Attorney General calls a secret agent who operates as part of the foreign intelligence network of a foreign power. The Attorney General described a well-organized foreign intelligence network.

Unfortunately the words that have been chosen in that provision are highly ambiguous and they do permit a lot of room for reaching questionable areas. Let me pause for just a minute to tell you where the law is on this. Again, in response to the suggestion that this bill somehow or other should be turned—an off-switch should be turned or an on-switch, and it should be electrocuted—the law on that is that in the Supreme Court's decision in *the United States v. District Court*. The Supreme Court hinted broadly that no probable cause of a crime was required for domestic security, even domestic security surveillance, even when there is no foreign involvement, they hinted that broadly, although a warrant was required. The fifth circuit and the third circuit that did not even require a warrant, of course, did not require probable cause of a crime. The District of Columbia Circuit in *Zweibon. v. Mitchell* suggested rather clearly that the Constitution would permit electronic surveillance in the foreign intelligence area, even of those who were not alien agents of a foreign power, even of American citizens, without the traditional showing of probable cause. The District of Columbia Circuit did worry about that and try to add additional protections, but probable cause of a crime has not been required by the Supreme Court or any of the three courts of appeals that have looked at it. Indeed, all four have suggested that there might be an occasion for departure from that traditional standard here.

Without going further, and I am going to urge you to go further protectively in definition here, but without going further the bill that appeared from the Judiciary Committee is accomplishing a great deal in the way of protection by its requirement of probable cause that an American citizen is acting pursuant to the direction of a foreign power. Without going further, and I want you to go further and I will tell you why—when one recognizes that the most important consideration in any search, and particularly in regulating electronic surveillance, is the fear of discouraging dissent, is the fear of quieting political opposition. It is important to see that this bill, simply by requiring the "acting at the direction of a foreign power," eliminates the wiretaps on President Nixon's own staff, Mort Halperin, and Tony Lake. There is no plausible case for it. A judge could not approve it. It eliminates taps on reporters, Joe Kraft. It eliminates taps on political opposition, even if the President could say that he believed foreign intelligence could be obtained by one of those taps. Indeed President

Nixon believed information relative to foreign intelligence would be obtained by most of those taps, but they would not be possible under this bill because a judge would have to find probable cause to believe that the person subjected to electronic surveillance was acting pursuant to the direction of a foreign power.

Let me now move, as I talk about what I would do with this provision, away from—the statement that I wanted to make in a rather clear way is that a remarkable event in the history of civil liberties is close to being accomplished. Nobody ought to push the off switch. Nobody ought to knock what's been done so far. It can be improved and it should be improved. Let me now talk about the improvements as I go on.

The fact of the matter is that neither the requirement that the person be acting at the direction of a foreign power, nor the fact that a number of courts have suggested probable cause of a crime isn't necessary, nor the fact that there are other situations where there are searches without probable cause of a crime—housing searches, a variety of searches, border search—none of those facts convinces me that we are not treading in a very questionable and difficult area with the definition of what American citizens can be subjected to electronic surveillance.

The problem here in its broadest form seems to me to be this, and I think maybe the most important thing is to say it in its broadest form. If the Committee staff, the Attorney General, the American Civil Liberties Union, everybody who worked on this bill could come up with an adequate definition of who it was that was a secret agent knowingly operating as part of a foreign intelligence network of a foreign power, it seems to me that it is difficult to argue that that person cannot properly be subjected to electronic surveillance. If an American citizen knows that he is operating as part of the intelligence network of a foreign power, I do not care personally whether he is committing a crime or not; I think the Attorney General is right that there is a sufficient governmental interest in finding out what is going on in a well-organized foreign intelligence network to warrant electronic surveillance.

The problem is that it turns out to be very difficult to define the meaning that the Attorney General this morning stated over and over again in those terms: a secret agent working in part of a network of a foreign power, knowing he is part of a network. It turns out very hard to define that precisely enough to eliminate a series of difficult questions. It does not help an awful lot to make it a crime, to require that it be a crime. What we want here is clarity. What we want is a definition that is limited so that it does not cover the American citizen who talks to his Congressman at the request of the Israeli Ambassador or the Greek Ambassador; so that it does not cover Jane Fonda who has contacts with the North Vietnamese and then participates in a demonstration some day. What we want is a definition that covers just what the Attorney General told you this morning he wanted to cover and nothing else, a secret agent who operates as part of the foreign intelligence network of a foreign power and knows he is doing it.

It does not make a lot of difference, again, whether the definition includes the requirement that it also be a crime. It is not going to help us in protection of our civil liberties, I do not believe. It is not going to assure the specificity that we want here, even if it is a crime.



A number of our crimes, including espionage crimes, are defined with a good deal of generality.

Now what can you do about that?

Senator BAYH. Before you say what you can do about it, in addition to the definition and your feeling that it does not make much difference whether we describe this crime, would you also feel more comfortable if it is not described as a crime, probable cause that evidence of a crime is not committed, to exclude evidence gathered from that kind of surveillance from subsequent criminal prosecution which is another part of the bill?

Mr. HEYMANN. The main reason, Senator Bayh, to exclude from a criminal prosecution any evidence collected where the executive branch claims it is not looking for criminal evidence, is to keep the executive branch doing what it claims it wants to do. In other words, if we exclude evidence taken under S. 3197, if we exclude that evidence in any criminal prosecution, we can be pretty sure that when the executive branch uses this bill, it is not trying to throw people in jail; it is trying to gather foreign intelligence. I am not convinced that that is a big problem in this case, that they will use S. 3197 as a device to get at people in order to send them to jail.

Senator BAYH. Not intentionally. Let me give you a hypothetical. You are having a search, narrow definition, right on target, it is an agent who has knowingly conspired and is known to be part of a network, and in the process of gathering this intelligence information you find out that on the Fourth of July five people are going to blow the Washington Monument and that they have the dynamite and the whole business. Then where are you? It is accidental information.

Mr. HEYMANN. I would do what is done in every other situation here, Senator Bayh, and that is I would allow it to be used in a criminal trial. It comes up over and over again in criminal law. It could have gone the other way at the beginning, but I could give you five instances where the Government in searching for one thing finds evidence of another crime. In every case it is permitted to be used. I do not see any particular reason to depart from that here.

Senator BAYH. When you say another crime, at least the warrant was leveled at criminal conduct.

Mr. HEYMANN. I do not have any doubt that where the Government searches you as you come into the country, searches your bag for contraband, if they find evidence of homicide in your suitcase, they can use it against you. If they search your house for housing violations, without a warrant, without probable cause of a crime, and they find moonshine whisky on which no tax was paid, I have no doubt that they can use it against you. I could see going the other way on all of these cases, and I would not have any objection to your going the other way in this case. But I do not see any particular reason either to depart from the general trend here.

Mr. SCHWARTZ. May I comment on that?

Mr. HEYMANN. Yes.

Mr. SCHWARTZ. I think there is one very big reason to depart from that trend, and it is a reason suggested in your own question, Senator Bayh. This is the first time in history that this Congress is legitimating intelligence tapping, which as has been pointed out, is by definition almost impossible to limit. We also have a history here, a troubling history, which is not the same as the Watergate history at all, but a

history of the Justice Department over and over again using so-called intelligence tapping as a device to evade Title III. It is interesting that since 1968 there has not been a single warrant application for sabotage, espionage, treason, or any kind of domestic disorder. Why? Because they have been using intelligence tapping, and therefore, since we are going to take an unprecedented step, namely, of legitimating intelligence surveillance. And we are doing it in an area which is so close and makes so easy the evasion of the Title III criminal situation with its much, much more restrictive guidelines, it seems to me that is the reason to break with precedent, because this whole bill is a break with precedent by legitimating intelligence surveillance in an area that is so close to criminal activity.

Mr. HEYMANN. I might very well be persuaded by arguments such as Herman's. I must say, Senator Bayh, my approach was one that I thought about for a very few minutes.

Senator BAYH. Well, I wish you would think about it a little more. We can maintain communication. I should know the answer to this, but do jog my memory on it. In the kinds of taps Professor Schwartz referred to, was information that was gathered therefrom permitted in a criminal case?

Mr. SCHWARTZ. In almost every one of those situations the Government chose to drop the case rather than follow through and reveal the tap. But there is case after case—namely Ellsberg, Egbal Ahmad, which is a Harrisburg conspiracy case—indeed you can get a very detailed statement of this in the October 1974, hearings on warrantless surveillance before hearings of the Joint Senate Administrative Practices Committee and the Senate Committee on Criminal Procedures. The testimony of William Bender and John Shattuck, to which I refer in my own testimony, has page after page of examples of this. These are all cases which grew out of the Vietnam and other kinds of turmoil of the 1970's. So, all we do know for a fact is that in each of these cases the Government admitted a wiretap had taken place. As a matter of fact, the other case we do know is the JDL case itself, where you have wiretapping going on 5 months before indictment and a month or two after indictment.

Mr. HEYMANN. I hope Herman will correct me if I am wrong in this, but I do not think there is any known exception at the moment to the rule that if the Government properly put itself, legally put itself in the place where it obtained evidence, it can use it in criminal prosecution, whatever the justification for having gotten there. However, Herman's point, which I think is a strong one and it struck me as he said it, is this bill would authorize taps for 90 days instead of 30 days, it's weaker in its minimization provisions, in a variety of ways it allows a far more expansive invasion of the privacy of a foreign agent, if that is properly defined, than is normal, and indeed than there may have been precedent for. If that is so, it may make some sense to treat the use of criminal evidence obtained in that way differently here. Of course, the Government always has the option of simply getting a warrant under the 1968 act and then using the evidence.

Ms. EASTMAN. After the fact?

Mr. HEYMANN. No, before the fact. It could always, instead of using this bill, it could have used the 1968 act.

Senator BAYH. Well let me rephrase the question. I will direct it to Professor Schwartz in a little different way. I think it was Professor Heymann who said that once the Government has put itself in a place legally and gotten information and has been permitted to proceed criminally, does that include putting oneself in the position on the basis of the President's "constitutional right" to get involved in electronic surveillance in the national security area?

Mr. SCHWARTZ. I think we do not know the answer to that because in case after case—I guess *Butenko* is one case where they did use it, except the problem with *Butenko* is that that really was an espionage investigation. I do not know whether they used it under a warrantless provision or not, but the truth is it was a real espionage. This was an agent involved in stealing documents of some kind. So I do not know of any specific case.

What we do know—and here again I would have to refer you to the people who made a direct, a much more close study—is that the evidence is very, very troubling about evasion of Title III by use of national security taps. There is only one example which came up in our debate last time with Senator Hruska. There is an indication in the *Masiah* case that there may be situations where if you invade sixth amendment rights, you cannot use the evidence, although you may use it to avoid a catastrophe from happening, but you cannot use it criminally. That is the only example I know, and that is a pretty far out example.

Senator BAYH. Would you give me four and a half minutes to get from here to the Senate to vote and then back? I apologize for this. They are not consulting with me.

[A brief recess was taken.]

Senator BAYH. Shall we proceed here.

Mr. HEYMANN. Senator, I will try to be brief. I have already taken a long time.

Senator BAYH. It is not you that is the problem. It is me.

Mr. SCHWARTZ. We have thought out all of these issues at the table and we are through.

Mr. HEYMANN. That's right. We have now resolved it, Senator.

Senator BAYH. Well, I hope they have been subjecting you to electronic surveillance, so I will have the benefit of that colloquy.

Mr. SCHWARTZ. I think it was live. [General laughter.]

Mr. HEYMANN. I wanted to make clear that I think the Committee has to do something about the language "clandestine intelligence activities," Senator Bayh. It is not, as I said, that it is not a crime; it is that it is poorly defined. "Clandestine" suggests evilness; but technically just being secrecy, that's part of the ambiguity in the term. The other part of it is secrecy itself can modify any of three parts in the phrase. It can be a secret direction of a foreign power, it can be collection of secret information, or it can be secretly collecting even public information by somebody who is even a publicly registered representative of a foreign power.

There are three places that secrecy could go. I do not want to spend a long time playing out the possibilities here. If I were you, I would take very seriously the possibility of substituting for "clandestine intelligence activities" something like the Attorney General's repeated statement this morning—a secret agent, I am going to add

the word "knowingly," who knowingly operates as part of a foreign intelligence network of a foreign power. I would consider substituting that for "clandestine intelligence activities." Another possibility is to require that the information sought by someone working pursuant to the direction of a foreign power is secret information, information that is being purposely retained in privacy by this Government, a foreign government, or a private enterprise. That is in my testimony.

Whatever you do, I think there is a nice procedural step that you could very well take. Most of what the Attorney General is concerned about would be a crime under either Federal law or the law of the State where the activity takes place. I would suggest that you add a proviso to the definition of "citizen foreign agents" which said, "Provided that the activity is not a crime under either Federal law or the law of the State where it takes place, the Attorney General shall promptly notify either this Committee or the Judiciary Committees of both Houses of the circumstances involved."

As a practical matter I think that would very much limit the possibility of abuse by whatever vagueness is left. What's more, it would keep this Committee or the Judiciary Committees in a position of continuing review that could very well lead to a still more precise definition of real network traditional spying.

Senator BAYH. Well, your last definition there is a disclaimer? It would be in a disclaimer section?

Mr. HEYMANN. No. I am suggesting something like what is now in the disclaimer section might follow a better definition of foreign agent. It might follow in section 2521(b)(2)—a better definition—that's the definition, it includes clandestine intelligence—I would change that definition. I am suggesting that you might thereafter want to add words almost identical to the proviso in the disclaimer saying "provided that if a warrant is obtained without showing probable cause of violation of a Federal crime, Federal law, or a law of the State where the activities took place, then the Attorney General shall promptly report to," and you name the committees, "the circumstances that justify that electronic surveillance." It will provide a substantial check on future Attorneys General. I have the same feeling you do about Attorney General Levi.

Let me move on to the last since I have already taken so long. The precise wording of the proviso I am suggesting is in my written testimony.

There are three procedures that deserve some attention. One is the question whether the judge should be required to find that the information sought is foreign intelligence information and that it is likely to be obtained by this electronic surveillance—those two things. This statute does not require him to find either. He is allowed to accept the certification of an executive official that this is foreign intelligence information, and even the executive official does not say that the particular electronic surveillance will probably obtain that information. He just says it is the purpose. I do not know precisely why—let me take a step backward.

I like the idea that the judge is not asked to determine whether particular information is foreign intelligence information or not. I do not think any judge will ever take that decision seriously, and I want the judge to take very seriously the question of whether he is

approving, whether the person on whom he is approving electronic surveillance is a foreign agent in a well-defined definition. I want the judge to focus in sharply on something that the judge feels he can judge, and that should be the definition of foreign agent, "pursuant to the direction of a foreign power" and whenever substituted for "clandestine intelligence." I am sort of happy that he does not have to decide whether it is foreign intelligence information.

Whether there should be a certification that it will be found as a result of this electronic surveillance seems to me to be relatively unimportant. I do worry about the lack of notice in this bill, but I think the Committee is already considering what I would regard as a sensible remedy there. Judges do get lazy. Judges can become rubber stamps for the Executive. It is especially dangerous in this area of foreign intelligence where the judge is likely to feel intimidated.

The normal law of search and seizure and the 1968 wiretap act deal with that to some extent by requiring notice to the person tapped, and then the person can scream, and the public can get into it, and the the Congress will get into it. There is probably good reason for not requiring anything like prompt notice under a bill such as this permitting foreign intelligence electronic surveillance. But there is no reason, as I think you, Senator Bayh, asked earlier this morning, why this Committee, which will be handling much more sensitive matters than the applications and the orders, should not have the right to full access to any applications and orders that take place under this bill.

For several years under Attorney General Levi there have not been any surveillances in this category. It should not be a large number. There is no reason why this Committee could not monitor the quality of the applications that are obtaining orders, as well as the number of surveillances. That seems to me to be a substantial assurance the judges will not get very lazy. Judges will be aware that somebody else besides the executive branch that is asking for the warrant is looking over their shoulders.

Finally, there is a wrinkle on the question you asked about use of any evidence found in a criminal proceeding, assuming that it is going to be used. I think the American Civil Liberties Union has a good point that where the record before the judge trying to decide whether the surveillance was legal is hopelessly obscure, the Government should not be free to use the evidence at trial and deny the judge the right to ask the defendant further questions which would clarify whether the surveillance was legal.

The way the bill is now written, on page 15 it is quite clear that if the record is very obscure, the judge cannot tell whether to suppress the evidence or not. He has no right to present the application and the order—or I take it any information—to the defendant in order to find out whether the surveillance was correct or not, was legal or not. It seems to me that if the record is very obscure and the judge feels he needs help from the defendant, in that situation he ought to be able to say to the prosecutor, I am not going to permit this evidence to come in unless we present the application and the order to the defendant and let the defense counsel argue about the legality of the surveillance.

I think it is too complicated to work out orally, and I would like to quit. What is required is in line 11 on page 15, where the third to the last word I am suggesting should read "or" instead of "and." That will mean that the final situation will be that wherever the judge can look at the papers and tell that it was a legal surveillance, that will be the end of it. The evidence will just go in. But when he looks at the papers and he cannot tell, and he says it would help an awful lot if I could hear from the defendant on this, he has a right to hear from the defendant, or, if the government prefers, he simply does not use that evidence.

Well, now I shall close. I appreciate the opportunity to be here. I think that the bill needs improvements. I think you are likely to make them. But I think it would be a catastrophe if, with improvements, this bill does not go forward. I do not know when again we will find an opportunity like this.

Thank you, Senator Bayh.

Senator BAYH. Thank you, Professor Heymann. I appreciate your assessment.

I must say to all of you that this has been an invaluable experience to me to hear the ideas that I have encountered today.

Professor Schwartz, you have been patient. Please go ahead. It is your turn.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF PROFESSOR HERMAN SCHWARTZ, STATE UNIVERSITY OF  
NEW YORK AT BUFFALO, SCHOOL OF LAW

Thank you for the opportunity to give my views on S. 3197, one of the most important bills affecting human rights to come before the Senate in this Congress. My statement will be in two parts: (1) General considerations about wiretapping and room bugging for foreign intelligence purposes; (2) Specific comments on this bill.

First, my overall conclusion: As I said in my letter of April 6, 1976, to Senator Edward M. Kennedy, "I think the bill is very much in the right direction." Bringing all electronic surveillance under a meaningful warrant procedure is a great improvement over our present situation. I indicated in that same letter, however, that "the points I raised [in my testimony before the Senate Judiciary Committee on March 30, 1976] are likely to determine how the bill will actually work out in practice", and I attached a rather detailed supporting memorandum setting out my problems with the bill and some suggestions. (I am submitting a copy of that memorandum to the Committee.) Unhappily, very few of these problems have even been addressed, much less resolved. As a result, a bill may be passed that will seriously encroach upon our First and Fourth Amendment freedoms. I therefore oppose the bill in its present form, and urge you to analyze its real impact very, very carefully.

#### I. GENERAL CONSIDERATIONS

In the first place, as you may know, I oppose all wiretapping and bugging as dangerous and unnecessary. As the Supreme Court said in *Berger v. New York* (388 U.S. 41, 63 (1967)), "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices", and the Church Committee report and staff studies amply document that. The purely physical scope of electronic intrusions is simply enormous and no exhortations to "minimize" are of any value, as witness after witness told the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance. These devices spy on everyone who calls or is called on the phone tapped, or is in the room bugged, no matter how irrelevant, intimate, or privileged the conversations and utterances, and no matter how remote any or all of these people may be from the matters under investigation. Privileged attorney-client conversations are especially vulnerable to electronic spying. See Summary of Evidence Considered by the Commission, in The Commission's Report last month, at pages

92-96. In this respect, wiretapping and bugging are very different indeed from the conventional search. Room bugging is particularly noxious. One can, after all, refrain from using the phone, but where is one to hide from a room bug? What could Dr. King have done to protect his personal privacy against the 12 or more bugs that were installed in hotel rooms occupied by him in his travels on behalf of civil rights.

So-called "intelligence surveillance" is even more indiscriminate and all-inclusive than the law enforcement variety. Where the surveillance is directed to a crime, there are at least some criteria for relevance, difficult as they may be to apply. But where intelligence surveillance is concerned, almost everything is grist for the mill. As FBI Director Clarence Kelley told Senate Judiciary members in October 1974, with respect to foreign intelligence surveillance:

In investigating crimes such as bank robbery or extortion, logical avenues of inquiry are established by the elements of the crime. The evidence sought is clearly prescribed by these elements.

But there are no such guidelines in the field of foreign intelligence collection. No single act or event dictates with precision what thrust an investigation should take; nor does it provide a reliable scale by which we can measure the significance of an item of information.

The value and significance of information derived from a foreign intelligence electronic surveillance often is not known until it has been correlated with other items of information, items sometimes seemingly unrelated.

Also, difficulty in determining the potential value of information derivable from such an installation makes it hard to predict the required duration of the surveillance.

Hearings on Electronic Surveillance For National Security Purposes Before the Senate Subcommittees on Criminal Laws and Procedures and Constitutional Rights (93d Cong., 2d Sess., p. 255 (Oct. 1974) (hereafter "Oct. 1974 Hearings"))).

The broad scope of intelligence surveillance even in conventional criminal cases, with examples, is discussed in my article in the *Michigan Law Review*, "The Legitimation of Electronic Surveillance: The Politics of Law and Order (67 Mich. 455, 489-71 (1969)).

In this context, minimization becomes not merely difficult—it becomes conceptually meaningless, for everything must be swept up for anything might be useful.

The threats to liberty inherent in intelligence surveillance are aggravated by the broad scope of "foreign intelligence information" in § 2521(b)(3)(ii)(b) of the bill: "information . . . deemed essential . . . to the conduct of the foreign affairs of the United States." Inevitably, as stressed by both the Supreme Court and the District of Columbia Court of Appeals, tapping and bugging for intelligence purposes infringes on First Amendment freedom of speech and association, as case after case and the Church Committee's reports have demonstrated. See *U.S. v. U.S. Dist. Ct., and Damon Keith*, 407 U.S. 297, 313-14 (1972), *Zweibon v. Mitchell*, 516 F. 2d 594, 657 (D.C. Cir. 1975). Today, foreign and domestic affairs are inextricably intertwined, and there will often be domestic dissent or other activities disturbing to the Administration aimed at "the conduct of the foreign affairs of the United States". In *Zweibon*, for example, the Court noted the many, many times that the surveillance had intruded upon constitutionally protected activities, by the Jewish Defense League, to say nothing of numerous lawyer-client conversations; this surveillance which lasted over 200 days, was said by the Attorney General and the Justice Department to be for "foreign intelligence" purposes.

Nor is there much cause for confidence in the warrant requirement as an adequate safeguard. It is certainly better than nothing, for some of the more egregious abuses probably would not have taken place if the perpetrators had had to reveal their plans to a federal judge in advance. But my study of Title III wiretapping does not offer much consolation beyond that. Judges accept boilerplate affidavits and ask for very little from the government. See, e.g., *U.S. v. Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972), *rev'd on other grounds*, 474 F. 2d 1246 (3rd Cir. 1973) (burden on government to show inadequacy of alternatives is not great). Perhaps the best illustration I can cite—though not, I hope, too typical an example—appeared in a Church Committee Staff Study in a footnote on pp. 292-93:

A Justice Department memorandum states that the current policy of the Attorney General is to authorize warrantless electronic surveillance "only when it is shown that its subjects are the active, conscious agents of foreign

powers". This standard "is applied with particular stringency where the subjects are American citizens or permanent resident aliens".

In one instance during 1975, it was decided that there was not sufficient information to "meet these strict standards:" and the Department went to a court for "orders approving, for periods of twelve days each, wiretaps of the telephone of two individuals." The court issued the orders, according to this Justice Department memorandum, even though "there was not probable cause to believe that any of the particular offenses listed in "the provisions of the 1968 Act for court-ordered electronic surveillance "was being or was about to be committed." The facts supporting the application showed according to the Department, "an urgent need to obtain information about, possible terrorist activities"; that the information was "essential to the security of the United States;" that the information was likely to be obtained by means of the surveillance; and that it "could not practicably be obtained by any other means." The Department has described this "*ad hoc* adjustment" of the 1968 statute as "extremely difficult and less than satisfactory." (Justice Department memorandum from Ron Carr, Special Assistant to the Attorney General, to Mike Shaheen, Counsel on Professional Responsibility, 2/26/76.), Vol. III, 292-93 n. 71.)

And for what? Over and over again, we have been assured that wiretapping is of enormous value and will be carefully used. Yet, a careful reading of the National Wiretap Commissioner's report on law enforcement surveillance makes it clear that the widespread use of this "dirty business" in conventional criminal matters has not made an appreciable dent in organized crime—the alleged purpose. They've caught a few low-level bookies—"mom and pop" type, to use an FBI spokesman's phrase—who generally get almost negligible sentences, but not much more.

The same seems to hold true in the national security intelligence field. From Richard Nixon to Ramsey Clark—and that, I need hardly say, is quite a range—the value of wiretapping has been disparaged. Talking to John Dean on February 28, 1973, about the 17 wiretaps installed to discover the source of leaks about the Cambodian bombing, Mr. Nixon said:

They [the taps] never helped us. Just gobs and gobs of material: gossip and bullshitting [unintelligible] (sic) . . . The tapping was a very unproductive thing. I've always known that. At least, it's never been useful in any operation I've ever conducted. (Statement of Information VII, p. 1754.)

(In that respect, he wasn't totally accurate—the information that the FBI picked up about a prospective article by Clark Clifford may not have promoted the national security, but it certainly was of political value.)

Ramsey Clark has declared that if all national security intelligence taps were turned off, the net adverse impact on national security would be "absolutely zero". Hearings on Warrantless Surveillance Before Senate Administrative Practices and Procedures Subcommittee 53 (1972). Morton Halperin, a former staff member of the National Security Council, has taken the same position. The *Butenko* court found that the taps in that case had been "ineffective and unsuccessful". *U.S. v. Ivanov*, 342 F. Supp. 928, 937 (D.N.J. 1972), *aff'd*, 494 F. 2d 593, 618-19 (3d Cir. 1974). The JDL taps did not prevent the Amtorg office bombing. *Zweibon v. Mitchell*, 516 F. 2d at 609, 610. Professor Philip Heymann testified at the October 1974 Hearings that there was no need to wiretap American citizens, resident aliens or foreign visitors except upon probable cause to believe a crime was being committed. On the basis of nine years of highly sensitive work in the Justice and State Departments, including work with the CIA, Professor Heymann said he couldn't "think of a compelling case for electronic surveillance of an American citizen that does not come within the categories of probable cause to believe that there is a violation of the espionage, sabotage or treason statutes", October 1974 Hearings 216, and he would treat resident aliens and visitors "the way I would handle American citizens". *Id.* at 219. As he noted, "the espionage statutes are very broadly written", and easily apply to leaks, for example. *Id.* at 216. (The worthlessness of electronic surveillance for the purpose of discovering leaks is also documented fully in the Church Committee and Staff reports.) See generally my testimony at p. 210 of the October 1974 Hearings.

Cutting across all of this, is what history has demonstrated time and time again: From the Alien and Sedition Laws to Watergate, it is clear that executive power cannot be trusted, that it constantly identifies national security with personal political security, and that in times of stress, even the courts cannot be trusted. Nor can we rely on good people in office. In the first place, we don't often have such good people around. In the second place, it makes little difference who is



the incumbent—once in office, Jefferson, Lincoln, Wilson, to name only the revered dead, all committed grave violations of civil liberties when they felt threatened. No executive caught in one of our perpetual domestic or international crises, can be expected to resist the temptation to use all the power at his disposal to fight criticism or obstruction of what he thinks he must do for what he often honestly considers the common good.

For all these reasons, any bill legitimating the "dirty business" of wiretapping and bugging must be scrutinized closely. It should not be rushed through but must be cautiously and carefully examined to make sure it gives away as little liberty as possible. Rushing is especially unnecessary today, when we are in a period of relative domestic tranquility and international peace, and when the Watergate and Church Committee revelations of governmental misconduct are still fresh.

Some say, however, that regardless of what prohibitions we impose, the government will continue to tap and bug anyway, so why not legitimate and try to control it? That counsel of despair is wrong on at least two counts.

In the first place, it seems clear from the Church Committee reports that when President Johnson and the Attorney General ordered an end to tapping and bugging, those practices were in fact substantially reduced. Such an outcome is especially likely if there were sufficient oversight by this or other congressional committees.

Secondly, it is just philosophically wrong to throw in the towel that way. That logic would dictate that the easiest way to reduce the crime rate is by simply repealing the criminal code and legitimating all or some kinds of lawlessness. We obviously don't want to do that.

It has also been suggested that a successor to Attorney General Levi might be unwilling to go along even with this bill, and might insist on operating solely within the Executive, resisting the notion of antecedent judicial scrutiny. Perhaps, but if so, he'd be running a grave risk of acting unconstitutionally under *Zweibon*. Although the Court there did not need to extend its holding in that case to so-called "foreign agents," it dealt explicitly with the problem and made it clear, at pp. 635-36, 644-45, that it would require a warrant and most of the Title III procedures as well, probably, for witting or unwitting foreign agents. It also indicated its belief, in *dictum*, that "no wiretapping in the area of foreign affairs should be exempt from prior scrutiny," *id.* at 651. And I'm sure it would feel bolstered in its position by the Church Committee recommendations that tapping of non-foreigners be done solely under Title III.

No. Instead of spending an enormous amount of time and energy on trying to legitimate what is basically wrongful, we ought to try to devise sanctions and enforcement devices to effectively stop these invasions of our fundamental liberties.

## II. SPECIFIC COMMENTS

I oppose the bill because it would authorize tapping and bugging of many, many American citizens, resident aliens and foreign visitors, for months and even years, without requiring any showing that vital information will be obtained and without adequate procedures for ensuring or even determining the legality of such surveillance.

### A. *Subjects For Surveillance*

#### 1. *Targets*

(a) § 2521(b)(ii). The bill would permit tapping and bugging of totally innocent and patriotic American citizens—as well as resident aliens and visitors—simply because they assisted someone else in obtaining some private information that related in some way to foreign affairs. The helping person need not know that the "person . . . engaged in clandestine intelligence activities" (whatever those are) is acting "pursuant to the direction of a foreign power"—he need know only that he is aiding the activities in question, for the word "knowing" modifies only the "activities" and not the "foreign power" direction. This could catch a Senator or Congressman who helps or provides information to a person who turns out to be acting pursuant to a foreign power's direction. It would have justified the spying on Martin Luther King, Jr. Indeed, it makes anyone in the United States a possible target of a tap or bug, even though that person has no intent or even suspicion that he is helping a foreign power, and may not in fact, be doing so. All it requires is that he knowingly help someone who is in fact "engaged in clandestine intelligence activities" for a "foreign power".

(b) And what are these "clandestine intelligence activities" anyway? In introducing the legislation on March 23, 1976, Senator Kennedy expressed great

concern about the meaning of this phrase, and I see no reason why that concern should not continue. All it seems to mean is "secret", but with sinister overtones. (The dictionary definition is "conducted with secrecy by design usually for an evil or illicit purpose.") But this covers anything done on a confidential or private basis. It clearly implies nothing unlawful, since that would be covered by Title III. Surely, precious First and Fourth Amendment freedoms of an American citizen or anyone else in this country, should not be thrown away simply because someone does something confidentially at the direction of a "foreign power".

(c) *Section 2521(b)(5)*. The definition of "foreign power" enlarges the category of possible targets even more. It includes "enterprises controlled by" a foreign faction or government. Many airlines, for example, and other commercial, cultural, industrial and other types of enterprises, are owned in whole or in part by foreign governments and therefore "controlled" by them; this may also apply to American concerns which serve as agents in specific ventures. Any and all of these may be targets under §§ 2524(a)(4)(i) and 2521(b)(5).

The possible scope of this bill may be seen from the following: If an American branch of an Israeli or Canadian bank "directs" an American citizen to obtain some international trade information in a quiet way, and that American asks another to help him—even if he doesn't tell the latter of the "enterprise's" "direction" (see prior discussion of "foreign agent")—taps and bugs may be installed on the phones, apartment and offices of the banks and of both Americans. And it is important to recall in this connection that all who call or are called on these tapped phones or are in the rooms or offices bugged, will also be overheard.

## 2. Subject Matter.

All this might perhaps be tolerable if matters vital to the nation's defense were at stake. But this bill does not limit electronic spying on Americans and others to such matters. For reasons not altogether clear, it abandons the three national security categories of the first sentence of 18 U.S.C. § 2511(c), and in § 2521(3)(ii)(b) includes information "deemed essential . . . to the conduct of the foreign affairs of the United States", which can include everything from an international ping pong tournament to grain sales to India or Russia, to aid for Israel. Moreover, it can reach matters that are largely domestic, for in the global village we now inhabit, few things are so purely domestic as not to affect and—in the eyes of nervous policymakers—be "deemed essential . . . to the conduct of the foreign affairs of the United States."

Again, if men were angels we might perhaps rely on their good faith. But angels are not to be found in government or anywhere else. Instead, we have harried public officials, beset by one crisis after another, and usually too worried about their problems or their jobs to be relied upon for the protection of individual liberty.

## *B. Predicates for electronic surveillance: "Probable cause" under §§ 2524(a)(6) and 2525(a)(5)*

The above discussion deals only with the targets of the surveillance permitted under this bill. Equally troubling and probably unconstitutional is the paucity of the showing that must be made before these wide-ranging intrusions are to be permitted. The bill does not require a showing that the desired intelligence is likely to be obtained by the surveillance. Sections 2524(a)(6) and 2525(a)(5) require only that there be (1) a certification by an executive officer that the "information sought is foreign intelligence information and that such information cannot feasibly be obtained by normal investigative techniques", and (2) a finding by a judge of probable cause to believe that the target is a foreign power or agent, and that the site of the surveillance is being used or is about to be used by the foreign power or agent. Thus, all that the statute requires a neutral magistrate to find probable is the target's identity and location. There is no requirement that a neutral magistrate find probable cause to believe that the information sought will be obtained from the target and at the location.

This omission seems unconstitutional. The legislative history of 18 U.S.C. § 2511(3) makes it clear that the test of "reasonableness" applies to national security surveillance, and, by citing *Carroll v. United States*, 267 U.S. 132 (1925), makes it equally clear that probable cause is necessary. See S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) at 94. The court in *Carroll* allowed the police to search without a warrant where a moving car is concerned, but only if there were probable cause to believe contraband would be found. See 267 U.S. at 153-54.

This probable cause requirement was made explicit in *Zweibon*, which insisted on "probable cause" to believe that certain categories of intelligence information are likely to be obtained from the surveillance even though evidence of crime

is neither sought nor likely to be uncovered". 516 F. 2d at 656. The Court went on to note the deference to be accorded to Executive assertions concerning the importance of the surveillance but added:

Nevertheless, '[t]he time has long passed when the words 'foreign policy' uttered in hushed tones, can evoke a reverential silence from either a court or the man on the street.' *Pillai v. CAB*, 158 U.S. App. D.C. 239, 252 n. 34, 485 F. 2d 1018, 1031 n. 34 (1973). See also *Keith*, *supra* note 2, 407 U.S. at 320, 92 S. Ct. 2125. Some showing should be required of the Government that the information sought, even when its need is viewed most favorably to the Government, is of sufficient import to justify the intrusion of surreptitious surveillance. 516 F. 2d at 657 n. 207. (Emphasis added)

Even the *Butenko* Court of Appeals majority—which seemed to require only a finding that the "primary purpose" was "to secure foreign intelligence information", *U.S. v. Butenko*, 494 F. 2d 583, 606 (3d Cir. 1974) did require a finding to that effect by a neutral magistrate.

Moreover, the statute requires the certification as to purpose only by an executive officer, which is a far cry indeed from a finding by the independent neutral magistrate required by the Constitution. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Apart from constitutionality, I think the omission is very bad policy, for it allows electronic surveillance of Americans and others even if there is no good reason to believe that vital, or even relevant information will be obtained. S. 3197 thus authorizes what is truly a general warrant in almost the literal sense—a pure fishing expedition based solely on the identify of the people involved, and not necessarily on anything they did or knew or intended. This is an ironic touch indeed in this Bicentennial year, when we commemorate a revolution fought in part because of the use of general warrants.

#### C. Duration and scope

##### 1. Minimization: §§ 2524(a)(5), 2525(a)(4)

The minimization requirements of §§ 2524(a)(5) and 2525(a)(4) seem limited to Americans only, and this seems inadequate. More importantly, this is a meaningless provision, as noted earlier. Though clearly required by the Constitution, the fact is that minimization is impossible, as a practical matter, even in the law enforcement area, as the National Wiretap Commission report demonstrated conclusively, and especially where bugging is concerned. My own analysis of the Reports to the Administrative Office of the U.S. Courts also shows that a very high proportion of intercepted conversations are admitted to be irrelevant, according to the prosecutors' own reports.

Where intelligence surveillance is concerned, minimization is almost impossible as a theoretical matter. As indicated earlier, the object is imprecise by definition and, as Mr. Kelley pointed out, the whole idea is to pick up bits and pieces of apparently irrelevant information. The Halperin and other taps, so thoroughly described in the Church Committee reports, show how much irrelevant stuff is picked up.

The inability to minimize intelligence surveillances, which are often allegedly for preventive purposes, poses a particular threat to First Amendment freedoms, as Justice Powell pointed out in the *Keith* case. Furthermore, the broad scope of the "foreign affairs" purpose of surveillance authorized by S. 3197, and discussed in section A above, makes minimization efforts even more useless, no matter how *bona fide* an effort is made.

##### 2. Length of Time: § 2525(c)

These fishing expeditions into the subjects' most intimate and confidential utterances are authorized for an indefinite period, or to put it more precisely, for as long as the executive wishes. The initial period is 90 days, but this may be extended by a showing of the same facts as in the original application. As we have seen this amounts to very little—identity of the target and place, and a certification as to purpose. None of these changes over time, so extensions will be granted upon request. Excluded, apparently by design, is the requirement of Title III that there be some explanation of why there is a need to continue the surveillance. Compare 18 U.S.C. § 2518(3)(c). Thus, for the looser intelligence surveillance, where we deal with people as to whom there is not even a probability of criminal involvement we allow much, much more longer spying than on those who could be immediately arrested because there is probable cause to believe they are criminally involved. See 18 U.S.C. § 2518(3)(a).

And the likelihood is that there will be many extensions indeed. Intelligence taps are notoriously lengthy, as indicated in my Michigan Law Review article. Figures provided Senator Kennedy a few years ago and analyzed by his staff and then by me, show that the average intelligence tap lasted from 78.3 to 290.7 days. Since the federal Title III taps lasted 13.5 days and averaged about 56 people and 900 conversations per year, the average national security tap caught between 5500 and 15,000 people per year, and the 100 annual average taps of recent years overheard between 55,000 and 150,000 people per year. See my paper in *Privacy In a Free Society*, 51 (Roscoe Pound—American Trial Lawyers Foundation (Cambridge, Mass. 1974)). Information developed in the *JDL* (*Zweibon v. Mitchell*), *Halperin* and other cases confirm both the lengthy nature of these taps and the vast numbers of people overheard. I find it difficult to see how this squares with the Constitutional mandates laid out in the *Berger* case, especially where we deal with a mere "foreign affairs" tap.

#### D. Notice

One of the most glaring deficiencies is the lack of notice to the targets of the tap. See the views of the Association of the Bar of the City of New York presented at the October 1974 Hearings at pp. 83-85. I think this too raises very serious constitutional questions of several kinds. In *Katz v. U.S.*, 389 U.S. 347 (1967), where Justice Stewart raised the possibility of warrantless surveillance for national security purposes, *id.* at 359 n. 23, he declared only that notice could be postponed, *id.* at 355 n. 16—he did not say, however, that it could be dispensed with.

Without notice, sanctions are meaningless, and without sanctions, whatever protections are purportedly provided are equally meaningless. Purely *ex parte* proceedings are not enough where fundamental liberties are at stake. As the example cited earlier indicates, overworked judges simply cannot be relied upon as the sole protectors of liberty without the aid of an adversary proceeding and scrutiny from the aggrieved persons. At least that much has been taught us by *Alderman v. U.S.*, 394 U.S. 165 (1969) and the whole history of the Fourth Amendment.

The lack of notice is particularly troublesome when the tap or bug is used for a criminal prosecution. Under § 2526(c), as the bill stands, a defendant against whom the surveillance is to be used is not entitled to notice of that fact; the judge may order disclosure of the order and application only on an affirmative finding that it would be useful. If the judge doesn't want to disclose anything, he doesn't have to. Again, the bill relegates crucial findings to *ex parte* determination.

The possibility that in many, if not most cases, the surveillance will never be disclosed and therefore subject to challenge, raises another constitutional question noted originally by Justice Robert H. Jackson. In his *The Supreme Court and the American System of Government*, he questioned whether issuance of wiretap warrants which might never be challenged was within the "case or controversy" prerequisites for federal court jurisdiction. *Id.* at 12. I am not an expert in this area, but I think that notice, without which no challenge is possible, would be a prerequisite to constitutionality if Justice Jackson's question is soundly based. Without a notice requirement and without the likelihood of a criminal case, it is difficult to see how the case or controversy requirement can be met. I think this is an issue that should be more fully explored by experts.

#### E. Procedures: § 2523

1. The statute permits judge-shopping, including applying to several judges until one gets to one who will grant it.

2. Appeals should not be *ex parte*, but should be handled like *mandamus* proceedings in which the defendant-judge is entitled to a lawyer. See, e.g., *U.S. v. U.S. Dist. Ct.*, where William Gossett represented Judge Keith. Someone from the Civil Rights Division or a special assistant could be designated.

3. The certification about the impracticability of other investigative methods is not likely to be of much value. Under Title III, where the judge must make a finding to the effect, the results have been worthless—judges routinely rubber-stamp the prosecutor's assertion.

I have two suggestions in this regard: (1) Require an explicit finding by the judge; and (2) make the legislative history clear that the judge is to exercise his own judgment here, giving due weight to the government's position. Although the judicial review of the government's judgment will probably be minimal, the mere existence of such review may be useful.

4. *Use in criminal cases.* The record is appallingly persuasive that so-called intelligence surveillance has been used extensively for enforcement of the criminal law, and to evade the requirements of Title III. See the 1974 testimony by William

Bender and John H.F. Shattuck before the Judiciary Committee. The *JDL* case (*Zweibon v. Mitchell*) demonstrates the same thing. The breadth of espionage statutes, the very close link between intelligence and law enforcement (indeed, many of us are really at a loss to know what it is that the government legitimately seeks that is related to the national defense but is yet outside both espionage and sabotage)—all these make it important to eliminate the temptation to evade Title III by using the very loose procedures of S. 3197 whenever anything connected with foreign affairs is concerned.

5. Section 4(l) (1) of the bill prevents foreigners from suing for illegal surveillance. Why?

*F. The Disclaimer: § 2528*

I must confess I still do not understand what the disclaimer provision is getting at and what it is supposed to accomplish. If the Congress thinks there are no inherent presidential powers, why even mention it? If the Congress thinks there are such powers and the provision is supposed to imply that, then why not say so openly so we know what is at stake and what we're talking about? And if the Congress doesn't want to take a position, why say anything at all?

Indeed, the reference to the possibility of inherent presidential power really does seem to imply an acknowledgment of such powers. For example, subsection (a) excludes from such possible power only surveillance covered by the bill. This may be read to imply inherent presidential power for other kinds of surveillance, such as visual surveillance, or the use of wired or other mechanically equipped informers where they encroach on attorney-client or First Amendment liberties, engage in entrapment, or do other lawless things. As I have testified earlier, I don't think there are any inherent executive powers to invade First and Fourth Amendment freedoms.

As to subsection (b), what does this add to the emergency power of § 2525(d)? What kind of situation did the draftsmen and sponsors have in mind? Again, I can't see any legitimate purpose to it and I wonder why it is there.

*G. Bugging, Section 2521(b) (2) (iii)*

Because bugging is much more noxious, and uncontrollable than telephone tapping I would delete all permission for that kind of surveillance, especially in the intelligence area where the parameters of relevance are even broader than in law enforcement.

### III. ADDITIONAL CONSIDERATIONS

In its present version, S. 3197 is a particularly dangerous bill for a host of external reasons in addition to those already discussed.

1. It is the first time intelligence surveillance is being legitimated, and the bill may well serve as a pernicious model for similar bills in the domestic area, as Justice Powell invited Congress to enact.

2. Its sponsorship and support by long-time adherents of individual liberty may induce many not to scrutinize it too closely.

3. Its support by a responsible Attorney General who is considered more sensitive to civil liberties than many of his predecessors will also induce a willingness to rely on a benevolent Attorney General, despite the lessons of history.

4. It may be used as a model for other kinds of surveillance, such as break-ins, and the like.

Instead of passing such a flawed bill, Congress would be better advised to adopt a proposal of William Sullivan, former FBI Assistant Director for Domestic Intelligence, who suggested in 1974 on the basis of thirty years experience that: Consideration should be given to have the government issue an order that no telephone surveillances or microphones be used by any federal agency during the next three years. At the very same time a vehicle should be set up to study for that three year period the effects of this ban to determine if the criminal and security-intelligence investigations suffered from the ban or not. The study should be done by knowledgeable men not employed by an investigative agency but authorized to have access to all the necessary evidence. *Privacy in a Free Society*, 99.

The Committee should combine this approach with efforts to devise methods of strictly enforcing such a ban.

### CONCLUSION

There are a few rare moments in history when governmental lawlessness becomes so onerous and obvious that a great leap forward can be made on behalf

of human liberty. One of those moments occurred just two hundred years ago when the colonists reacted to violations of their rights to privacy and speech by founding a nation on principles of freedom and democracy.

**TESTIMONY OF HERMAN SCHWARTZ, PROFESSOR, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SCHOOL OF LAW**

Mr. SCHWARTZ. Let me just say that I think this is a remarkable day for civil liberties, but I do not think it is for the reasons that Mr. Heymann has suggested. It is remarkable, perhaps, that this is the first time that we may be legitimating electronic surveillance for intelligence purposes without a crime on Americans.

Mr. Neier and I have not collaborated on our testimony, so I do not really know whether we agree in nuances; but I do know that my position is very similar and that the position that I will take is very similar to that of the Church Committee. I am a little startled at Mr. Heymann's shock that one should oppose this kind of bill when the Church Committee said flatly, "all nonessential electronic surveillance, mail opening, unauthorized entry, should be conducted only on authority of judicial warrant." That is recommendation 51, that all nonessential electronic surveillance should be according to Title III with one exception, and that is for foreigners, for agents, officers, employees, or conscious agents of a foreign power.

Under the Church Committee recommendations there would be no tapping of Americans if there were no Title III, in addition to which, as I gave my good friend Mr. Heymann notice a few minutes ago, I was well along the way to misrepresenting a former position of his; and that is, I think as I read his testimony of October 1974, before the committee I spoke about before, and this appears on page 5 of my testimony, according to the way I read it, perhaps I misread it and if I did I am sorry if I did Mr. Heymann any injustice in this matter; but Professor Heymann himself said that he saw no need to wiretap American citizens, resident aliens, or foreign visitors, except upon probable cause to believe a crime had been committed. Perhaps he has changed his mind. But the only point I would make at this time is that the position that is being suggested here is in no sense an outlandish position. The bill that I would recommend would be a bill going precisely along the lines of the Church Committee recommendations, which is that you do not tap Americans or resident aliens without complying with Title III.

Mr. HEYMANN. May I just say something?

Mr. SCHWARTZ. Of course, personal privilege, obviously.

Mr. HEYMANN. I want just to make clear that my position remains about the same on this. I think it is a close question.

Senator BAYH. May I ask a question? Those of you in the academic field, are you under the same or similar constraints to change your positions as we are in the political field?

Mr. HEYMANN. I think the fear of appearing inconsistent, even over a period of 20 years, affects us all. I regard it as a very close question today whether, if I were starting fresh, I would limit the executive branch to the espionage-sabotage laws basically. That is a very close question. It would give us more protection, not because it is a crime, but because those laws are fairly narrow, those crimes are fairly narrow, even as vague as espionage can be.

On the other hand, I cannot make a convincing argument that Attorney General Levi is wrong in saying anyone who is a secret agent, part of a foreign intelligence network, and knowing that he is, ought to be subjected to governmental surveillance. I cannot say that is wrong either. In short, I am very much on the fence here. My own view is it depends on whether you can define Attorney General Levi's category adequately and precisely. If you can, I would have no great objection to it.

Mr. SCHWARTZ. Let me go on from there to say that there is a tone in this testimony in support of this bill, that if we do not grab the opportunity now we will never have it again. I do not see that at all.

The courts, certainly the *Zweibon* case, are moving toward tightening up these procedures. In fact, if *Zweibon* is to be the way of the future, and we do not really know that, but *Zweibon* is the only case which has addressed this at great length; it made very clear that for most situations, in fact with almost no exception, it would require some kind of judicial warrant. I find it very difficult to believe that with all of the qualifications within the *Zweibon* case to shape the warrant to the appropriate circumstances—and by the way, this even goes to embassies, one of the footnotes refers specifically to that—a warrant procedure is not likely to be coming judicially mandated, because that is one of the other changes in the situation. The courts are beginning to get very worried about this kind of stuff, and if we wait a while, it is hard to believe that things will get very much worse in terms of appropriateness for passage of tightening-up legislation.

Now I would like to start a little bit, and I hope I will not be repetitious or redundant, with some first principles. We are not dealing with an ordinary search. We are dealing with wiretapping, which inherently is almost impossible to limit. One of the most interesting revelations of the National Committee for Review of the Federal and State Laws Relating to Wiretapping and Electronic Surveillance, the Presidential Commission set up pursuant to the 1968 act, is that minimization is almost a total failure, and this is under Title III wiretapping, where you have a crime which can provide some kind of precision. Clarence Kelley testified at those October 1974 hearings, that that element, which provides a certain set of criteria for precision, is totally absent in the intelligence context. So, what we are talking about is a general warrant with a vengeance. Once we specify who the person is, anything goes. Everything is fair game, and it is virtually impossible to avoid that kind of dragnet. So, we are really back 200 years later to the general warrant situation.

When we look at this particular statute, and I will touch as briefly as I can a little bit later on this aspect, on the foreign side, with the almost inextricable interconnection between domestic and foreign that we know to be so clear as we have become a world power and live in what Marshall McLuhan referred to as a "global village," what we are really talking about is anything and everything. And for a reason which I do not understand, the original contours of the foreign intelligence exception, if you will, as set out in Title III, namely the three categories of the first sentence dealing with hostile power attack with the safeguarding of American intelligence and with the gathering of intelligence from foreign powers, that has been expanded by something which is truly a wild card, which includes anything and every-

thing. That is the fourth definition in the provision at 2521(b)(3)(ii)(b), information deemed essential to the conduct of the foreign affairs of the United States.

As the *Zweibon* case said, talking about something very similar to that, that includes the Bolshoi Ballet, it includes grain sales, it includes international ping pong, it includes anything and everything. If you look at Ramsey Clark's testimony, which he has given several times before Senator Kennedy's committee and others, you will find that he turned down applications for every conceivable kind of tap of something with a foreign nexus—agricultural attachés, the whole range of things. We are dealing with a bill here which would allow tapping for enormously lengthy periods of time, I want to comment on that as well, on anybody who is identified as a foreign agent.

Now the warrant requirement—I think Senator Biden's comments are very helpful here—I think a warrant requirement probably would avoid what John Mitchell felicitously called some of the White House horrors, and I think insofar as that would have happened, that is fine. There are some things they will not take to a judge or some things they will not do if they have to let a judge know they are going to do it. But apart from that I do not think we have very much to allow, especially not under this statute.

Now the question is if we are dealing with a very broad range statute, "for what?" To get foreign intelligence information? And yet, we have heard over and over again from Ramsey Clark, Morton Halperin, a range that runs from Richard Nixon on the one hand to Ramsey Clark on the other, which I am sure you will admit is quite a range, that wiretapping for national security purposes isn't worth very much. You may recall the Judiciary Committee hearings, there was the conversation between Nixon and John Dean in which he says to him, "The tapping of the 17 wiretaps. The tapping is a very unproductive thing. I have always known that. At least, it has never been useful in any operation I've ever conducted." Ramsey Clark said the impact would be absolutely zero if you turned off all national security taps. Not only that, there is an interesting suggestion by former Deputy Director or Assistant Director of the FBI for Domestic Intelligence, William Sullivan, who was in charge of most of this stuff, a suggestion by him to the Roscoe Pound conference back in 1974, that all national security; and in fact all taps be turned off for 3 years, and that we see what happens. He raised the possibility that nothing much terrible would happen.

Obviously wiretapping, obviously intelligence tapping produces some useful information. Any tool does. But what we are talking about here is an enormously intrusive, uncontrollable device, and the question is, are you giving up more than what you have to gain? What I am suggesting is that the revelations before the Church Committee, which found over and over again that, for example, with respect to leaks, wiretapping never did any good, and with revelations in other contexts, the potential for abuse is far, far greater than whatever is likely to be obtained.

Now I know that is not a popular position. The Attorney General comes in here and says I need it, especially an Attorney General like Mr. Levi, who obviously is cut from a different mold than many of his predecessors. The fact remains, however, that the case has not



been made. I would suggest, and here again I am simply reiterating a difference with Mr. Heymann, that before this Committee passes legislation, it look very deeply into that threshold question of how much do we really need these kind of devices for this kind of stuff. Then maybe the Committee will find that the need is very small and the wraps should be very, very tight indeed.

Senator BAYH. Are you going to go on to another subject now?

Mr. SCHWARTZ. I was going to comment first on the suggestion that look, if you don't try to control this, they will do it anyway, and then I will turn to specific sections of the bill.

Senator BAYH. Well, remember where you are because I would like to really sort of nail down whether we really are talking about a threshold or not. I may be wrong, but as I recall the ACLU position has always been no electronic surveillance, period.

Is that accurate?

Mr. NEIER. That is correct.

Senator BAYH. No matter what the threat might be, you do not feel that electronic surveillance as a tool should be used?

Mr. NEIER. On the ground that it does not meet fourth amendment standards of particularly describing what is to be seized. Inevitably electronic surveillance sweeps in everything and becomes a general search.

Senator BAYH. Does that apply to foreign agents, foreign citizens operating in this country, as well as American citizens?

Mr. NEIER. We have a flat position. I would say that I am not aware that the Constitution has ever been determined to apply less to anybody who is in the United States than to an American citizen.

Senator BAYH. But you have this across-the-board prohibition.

Professor Schwartz, are you in that same position?

Mr. SCHWARTZ. Very close.

Senator BAYH. How close?

Mr. SCHWARTZ. How close?

Senator BAYH. Talk about tight wraps, does that really suffocate the baby—the blanket is so tight there is nothing left to discuss?

Mr. SCHWARTZ. With respect to law enforcement wiretapping, I have come to the conclusion that there may be a few rare cases where it can meet the specificity requirements. The *Katz* case was one such case. I have also come to the conclusion, however, that by and large it will never be so restricted; that by and large there is no way in which wiretapping can be limited to the few very rare cases. Certainly Title III does not even purport to do that, and under the circumstances, since all social policy involves trade-offs between what you gain and what you lose, I wind up saying that as a practical matter, "Yes, I am opposed to all wiretapping," that is, law enforcement wiretapping in the foreign security area. I certainly have no problems with opposing all law enforcement wiretapping with respect to American citizens, certainly all warrantless and certainly all non-Title-III tapping. Then, when you move to the next stage of intelligence tapping, I do not think there ought to be any intelligence tapping because I think that, more even than with Title III, there is simply no way to control it. Since you have moved automatically into an area of first amendment involvement, as the court said in the *Keith* case, as all of the courts have said which have dealt with it, I wind up pretty

much against all intelligence surveillance. The only exception I can think of is that which involves the embassy situation, and there I am impressed with the comments of former Attorney General Ramsey Clark and others, that that really turns up nothing of consequence, in truth mostly an enormous number of Americans who keep calling embassies and the like. So, on balance, I wind up with a pretty flat no, although for a whole series of different reasons, dealing with different situations.

Senator BAYH. You said that pretty clearly.

That is not Professor Heymann's position, and so we have a difference.

Please go ahead.

Mr. SCHWARTZ. I think one difference between Professor Heymann and myself is that I notice—and I do not know again whether this is a misreading of what he said—I notice that Mr. Heymann in his testimony said before that he did not see a very sharp distinction between wiretapping and other kinds of searches.

Mr. HEYMANN. [Nods affirmatively.]

Mr. SCHWARTZ. I think that is a very, very significant difference between us. To me the difference is absolutely enormous between the conventional search and wiretapping in terms of both first amendment and fourth amendment specificity requirements.

Senator BAYH. Is he accurately describing you?

Mr. HEYMANN. This time, Senator Bayh, he is accurate.

Senator BAYH. Opening mail, direct search, wiretapping are all the same to you?

Mr. HEYMANN. I do not remotely think that it is worth much today. I do see the wiretap issues as very similar to the search issues. I think I would say that what Herman objects to is a general search because you pick up many conversations on a wiretap other than the one you are seeking. This is true in any search, because when the police officers go in and look for a rifle somewhere in the house with a warrant, they see everything else, and they are allowed to pick up anything else that looks like evidence as they go through the house looking for the rifle. But I am afraid I have now tempted Herman into a response on that purely law professor's issue.

Mr. SCHWARTZ. I disagree very, very sharply with that. I must say I think I am supported in that by the Supreme Court in the *Berger* case, which explicitly said that wiretapping is perhaps the most awesome threat to civil liberties and is the equivalent of a general search when kept on for 30, 40, 60 days of daily kinds of interceptions. It is really equivalent to a fishing expedition. But that is a more fundamental thing that we could, though should not here, argue for days.

Let me turn to the specific comments on the bill rather than these general considerations. I have a prepared statement which has been submitted, and I would make one request, which is that I have a couple of additional comments on page 5 of the statement. I would like permission to mail an appropriate insert to fit into that page 5.<sup>1</sup>

Senator BAYH. Certainly.

Mr. SCHWARTZ. You have heard enough about this notion of the excessive breadth of the agent provision. I feel very strongly that as written, regardless of what Mr. Levi says, it includes unwitting

<sup>1</sup> See p. 158.

Americans who knowingly help, but do not necessarily know anything at all about. Pursuant to direction, I have proposed language which will cure that and the staff has that language.

Senator BAYH. It is similar to the Heymann language?

Mr. SCHWARTZ. I think so.

The language I have reads something like: "A foreign agent is somebody who, pursuant to the direction of a foreign power, engages in clandestine intelligence activities, sabotage, or terrorist activities, or someone who, knowing that such person engaged in such activities pursuant to the direction of a foreign power, conspires with, assists, or aids such activities. That I think would catch the necessary knowledge with respect to both the assistance and the direction. It would deal with that problem. But I think that is a relatively small problem in the total picture.

The next problem I have is, of course, with the definition of "clandestine". You have heard this morning, as I think Senator Biden commented, all it means in the dictionary is secret, with sinister overtones. I think that that adds nothing, and I think that that is very dangerous language to have. I think to my mind the most important breadth and ambiguity deals with the expansion of foreign intelligence information to material beyond national security, if we are talking on specific details. I think the possible scope of the bill can be seen really from a very simple example.

Let's suppose you have a American branch of an Israeli or a Canadian bank. The bank is considered a foreign agent because that includes enterprises controlled by foreign governments. Any employee of that agent is a foreign power. If that employee privately, confidentially, quietly, whatever is involved in that word "clandestine" tried to get some trade information, asks someone else to get him that trade information, that is covered by the statute. There would be nothing dangerous to the security of this country. There may be nothing wrong with it. Certainly this is intended—the one thing we do know is this is intended not to include illegal activities that go beyond it. A tap can be put on the phones, or a bug can be put in the offices or homes of any one of those three under this statute, because any one of those three fits within the definition of a foreign power or foreign agent. The intelligence activity gathering is clandestine because it is not publicly proclaimed, whatever that means, and it affects the foreign affairs of the United States.

Now I don't think we want taps and bugs, and we are also talking here about room bugs, such as the 12 or more that were put in Martin Luther King's hotel rooms. We do not want that kind of thing; and yet this is precisely the kind of thing that would be allowed by this kind of bill, as it stands, even if you improve the definition of foreign agent to include somebody who knows of the involvement of the foreign power.

Senator BAYH. Let me ask you this, and I should have asked it a moment ago.

I guess I am going to ask the Attorney General because he seems reconciled to the fact that "clandestine" is rather vague and he wants to insert different language. In trying to describe what we are after, do we describe what "clandestine" is, or what it is not? The types of acts that we are really after, or the types of acts that are excluded,

namely having lunch with the Israeli Ambassador and then going to a concert?

Mr. SCHWARTZ. That would include, I think, a confidential talk with a Congressman, because that could be considered clandestine. I must say I do not know how to answer that. I don't even know why clandestine surveillance is in here at all. Mr. Levi said it was originally because of a notion of spy, but that clearly does not mean anything.

The problem that you are dealing with here essentially is not so much with a definition of foreign agent in that respect; it is that you are allowing intelligence surveillance for an enormous range of activities which do not involve a crime. That is the real problem, and it seems to me that the Church Committee recommendation is precisely the way to go. You do not allow it for American citizens, or resident aliens who are concerned. You avoid all of these problems if you would just buy the Church Committee's recommendations and have a bill drafted that way. Then you do not have to define "clandestine". You do not have to try to figure out what this sinister concept of network is, because that is also a nice pejorative term and it also carries all of these overtones of people meeting late at night and planning to steal all kinds of secrets, which somehow are still not a crime.

Senator BAYH. It is hard to separate these questions that I have into a neat little package because they are all interrelated; who it is, what type of activity they are up to, what kind of information they are after. It is commingled with all sorts of other things.

Let me try to present a hypothetical. Let's take a member of the armed services in this country, or someone who is working for the Atomic Energy Commission; you can pick any sensitive role you want which has indeed met the criteria of our new definition of an agency relationship there. He has prepared at some future date—I suppose if they actually offer for sale plans or secrets, that gets into a criminal act which can be covered elsewhere:

Mr. SCHWARTZ. That is right.

Senator BAYH. Suppose they say they want to talk about it. Is there no such person in that category that maybe we ought to keep an eye on, particularly if you listen to the intelligence people on the other side? If you have someone, let's say it is a person who has directly violated a criminal statute, well then that question is moot.

Mr. SCHWARTZ. Yes; because then you can get a Title III.

Senator BAYH. Right. But so often they tell us in the intelligence community that instead of putting the guy in jail, we want to listen to him to see who else is involved that we now are not aware of, so we really have a full idea of the insidious nature of the intelligence operation.

Mr. SCHWARTZ. Sure. That is a perfectly normal thing which law enforcement authorities always do. But almost by definition that is dealing with people who are awfully close to committing a crime, particularly in view of our espionage statutes, which are really very broad. Let me add also that you also have—Ms. Eastman whispered something about conspiracy—but you also have "intent" statutes which really go pretty far back in the chain of operation. I would think—and here again, not being a member of the intelligence community I cannot come up with answers to the specific cases as they are provided because they have not been provided that way—but the

truth is, as I read the open hearings, I have not seen very many cases of that kind.

Senator BAYH. Excuse me. You will have to excuse me.

Mr. SCHWARTZ. Senator, if you keep this up, we will have to offer you a law school teaching job.

Senator BAYH. We have someone. We know he is cloak and dagger. We know he is definitely here, working in the Russian Embassy or some other embassy. We have tracked him through our intelligence community and we know he is a Russian KGB agent. We then are able to observe not only him in communication with, say, Citizen X out here, but we observe one or two surreptitious drops and pickups between the two. Is that cause to be concerned about Mr. X out here?

Mr. SCHWARTZ. It is also grounds for probable cause, and if you have an agent—

Senator BAYH. You see, it is the awfully close cases that concern me. They really worry me. If it is not close to probable cause, forget it. I come down clearly on the side of right here, there is no test. But if it is close to probable cause but not yet quite across the line, go ahead.

Mr. SCHWARTZ. No, no; I think it would be very rare that a law enforcement authority could not get probable cause in that kind of situation. It seems to me, Senator, that one of the problems with all legislation, particularly in this area, is that if one tries hard enough and thinks long enough, one will come up with a theoretical case that sounds pretty bad. But that is not what this legislation is about. The legislation is not for a single theoretical case. It is going to wind up in the hands of the kinds of people who always have power of this sort: People who are harassed; people who see a job that they have to do; people who, like Lincoln, Wilson, Thomas Jefferson, had no hesitation about civil liberties problems when they felt they had something to do that they thought was for the good of the country or for their own good.

Everybody, as I say, if you think long enough, hard enough, will come up with that hard case which the other person, particularly the civil libertarian, will say, "Yes, that is a rough one." But this is not just Fourth of July rhetoric, to say that we are always taking chances. There are a lot of things we simply do not do because we lose more than we gain in an occasional case. I have to fall back on the fact that people who have been in positions of power, like Clark and Halperin and others, who are not naive, who are not irresponsible, people like FBI Assistant Director Sullivan, all felt we could get along without this tool. It seems to me that that is the way to go. If there is some question, the Church Committee compromise commends itself to me. After all, let's not forget that what we are talking about again is putting a tap or a bug on for 90 days, and then almost invariably 90 days again, and almost invariably 90 days again.

The Kennedy committee, and Mr. Epstein is here on this staff, did computations on figures provided by Attorney General Mitchell and found out that the average national security wiretap lasted from 78 to 107 days. The taps that have come to light we know have averaged anywhere between 7 months to 21 months, and these are taps which are on all the time, with a recorder 24 hours a day, which cannot

possibly be monitored to minimize that. That is what we are talking about. I did some rough computations and you wind up with 100 taps a year, which is what we are told are currently in effect—100 national security warrantless taps these days.

Senator BAYH. Apparently none directed at American citizens at this moment.

Mr. SCHWARTZ. Apparently, but still 100 directed at somebody. That turns out to be between 5,000 and 15,000 people a year at least for that. Again we are talking about areas which trench very closely on first amendment problems, foreign policy and domestic policy.

Senator BAYH. Why don't you just go ahead with your statement.

Mr. SCHWARTZ. Let me see if I can speed up and just say a line or two about each of the other points that I have. I disagree very sharply with Professor Heymann about the significance of probable cause to believe that something will be found. The *Zweibon* case indicated rather strongly that that was a decision that had to be made, and had to be made by a judge. The certification is inadequate, and the fact that it is only by an executive officer and not by a neutral magistrate seems to me to raise very serious constitutional questions. In fact, even in *Butenko*, both the Government and the Solicitor General—I'm sorry, both the court and the Solicitor General—seem to agree that the purpose finding had to be made by the court because the Solicitor General said we had to demonstrate that, and it seemed to imply that there was a judgment by the court.

It seems to me this is terribly important because otherwise if somebody falls within that definition of foreign agent or foreign enterprise, that means that they are indefinitely subject to being tapped because the test for an extension is not the Title III test, which I think is terribly strong. It is not the Title III test, and that may be an explanation of why they did not find something or maybe even a fresh probable cause. It is simply a reaffirmation of the fact that this person is a foreign agent and that information can be picked up at that location. Those things do not change, or it is not very likely that they change. That means that this statute allows indefinite tapping of anybody who becomes a foreign agent, even though there is no showing that something is likely to be picked up or an explanation of why during the first 90 days nothing was picked up.

I have already commented on minimization, which it seems to me is analytically, conceptually impossible. The notice provision is a very serious problem. I am not sure I know how to answer that problem because of the long-term nature of this operation. I do think there is a limit, an interesting constitutional question which Justice Jackson raised in connection with wiretapping in general, some 30 or 25 years ago.

In this statute most of the wiretaps will never be challenged. That raises a very serious question as to whether we have a case for controversy for constitutional purposes, because there is nothing being fought about.

I am not an expert in this area, but it seems to me that constitutional scholars of that problem ought to look at it. It is aggravated by the fact that it remains *ex parte* all the way up to the appeals level. I see no excuse whatsoever for that. It seems to me that when there is some appeal, it ought to be like a mandamus proceeding, and the

lower court judge is entitled to a counsel. That is the way it was in the *Damon Keith* case. William Goss, former ABA president, was chosen as counsel to Judge Damon Keith. Otherwise, you are going to have an *ex parte* proceeding, an *ex parte* proceeding all the way, and everybody knows an *ex parte* proceeding is by definition one sided, and therefore the chances of getting at the truth are minimized.

Judge shopping is allowed—I know you have discussed this earlier. It does not even require that there be only a single application. Several of us know and have seen in the past where differences between judges are so strong, sometimes both on a personal and other basis, that if one judge says “No,” there is a good possibility the other judge will say, “Yes”.

The disclaimer provision—I still do not know what it is supposed to do; I do not know what it means. If it is supposed to say that the President has no power in certain areas, it should say so. It doesn't. It omits such things as visual surveillance. It omits the use of wired informers or other kinds of informers who use mechanical devices who might be involved in illegal activities, such as entrapment or break-ins. I do not know what it is supposed to do. I do not know what is gained by it. It seems to me one is much better off just leaving it out.

There are a few additional considerations urging caution. It is the first time intelligence surveillance is being legitimated. It is being sponsored and supported by long-time adherents of civil liberties. It is being supported by an Attorney General who has shown responsiveness to civil liberties. It may be used as a model for other kinds of surveillances. I think that on balance this committee should examine each of these provisions very, very closely. It should not be rushed into anything. There is, I think, a tide moving hostile to this. I think the very least that this committee should do is seriously consider replacing this bill with provisions modeled on the Church Committee recommendations. I think it would be an ironic commentary if in this, our Bicentennial Year, we not only wasted a very rare opportunity to advance the cause of liberty, but actually retrogressed by legitimating governmental encroachments, really much worse than anything our ancestors feared or thought.

Thank you, Mr. Chairman.

Senator BAYH. Professor Heymann, do you have any thoughts relative to what would be the impact of modified legislation? Would you feel it necessary to totally eliminate a disclaimer?

Mr. HEYMANN. I testified before the Judiciary Committee that I do not think the disclaimer is necessary. In other words, it is a strange piece of legislation that requires a clause to say that it does not cover anything that is not covered by the legislation itself. It is a very strange thing. The only reason I can see for having the disclaimer there is the perhaps not trivial point that the President retains symbolically the meereest fragment of a very long term claim, a 30- or 35-year claim, to an inherent power here.

In other words, something other than complete and utter surrender on the part of the executive branch is accomplished by maintaining the second clause of the disclaimer. I do not have any idea why the clause of the disclaimer that says this does not cover overseas matters is included, because by its very definitions the statute does not cover

overseas matters. It does not trouble me, by the way. We had that argument while you were gone. I do not think anyone is going to misconstrue either part of the disclaimer clause. I do not think it will ever cause trouble. I think some people may wonder in future years why the first paragraph was there. They may wonder why the second paragraph was there. But I see no trouble down the line from either paragraph.

Mr. SCHWARTZ. I think that is an interesting commentary on a legislative provision, that people will simply wonder why it is there in years hence.

Senator BAYH. You do not think that is unique about legislation now, do you? [General laughter.]

Do you folks from the ACLU have any comment here? I do not want to keep you out here, from your vantage point, I might say in left field instead of right field, which it is from mine. It has been a very interesting dialog. I had a lot of other questions I was going to ask, but frankly they have all been answered to varying degrees in our sort of informal give and take here.

Ms. EASTMAN. Senator Bayh, I would like to ask something.

Senator BAYH. Now wait a minute, I am supposed to be asking the questions.

Ms. EASTMAN. I'm sorry. I thought you were asking us if we wanted to say something else.

Senator BAYH. Please go right ahead. I'm pulling your leg. Please forgive me. Ask away.

Ms. EASTMAN. Professor Heymann began his remarks by suggesting that anyone who sought nonpassage of this bill was irresponsible and lacking a sense of responsibility. Obviously I find it to be a somewhat offensive characterization because I put myself in that category. But I do not say this now to just respond to that, but to say that this is not the only choice of Congress, to take this bill or nothing.

We have proposed in our testimony some other options for the Congress, and the response has been in the conversations in the corridor and whatnot that your options are limited by what the Attorney General is going to accept. The only thing I really want to say is that even if that is a valid way of deciding what legislation Congress wants to adopt, nobody really knows how far they are willing to go to avoid a judicial determination along the lines Professor Schwartz was talking about, that warrants are required in more areas than they want them; no one knows how far they are prepared to go on this unless you push them as far as you possibly can.

Senator BAYH. Well, let me give you the assessment of one Member of Congress. I think whether it is in this area or some other, I'll bet this is a uniquely sensitive area, and I would rather err on the side of caution. But if one is to suggest that his or her position must be pursued because you never know how far the other side is going to go until you push them to it, from my legislative experience very little legislation of any kind is going to be passed that way.

Frankly I am not bothered about whether you have to get the Attorney General's aid on this or not if he is not willing, with all respect to him, to support provisions that I feel meet a reasonable standard as far as protecting individual liberties. I mean, I am not all tied up with this. I do not really think we know—and many attor-



neys seem to be very amenable to studying this—exactly what the bill will mean until we get to looking at words, and I don't mean to be facetious about that. To me the whole argument is OK, having pushed him as far as he will go, and having gotten a reconciliation to the differences between sponsors on the Hill, or Members of Congress, and the administration, that when you have that you have something better or worse than where we are now.

It is very frustrating this, this whole legislative process.

Thank you, Professor Schwartz. I very much appreciate your being here.

Mr. SCHWARTZ. Thank you, Mr. Chairman.

Senator BAYH. It is very frustrating, this whole legislative process.

A lot of us have ideas in a number of areas where we would like to go, but all too often, instead of being able to write our programs and blank check the whole, we have to say, "OK, we are going to have to compromise." We don't like to do so, but will so long as we are better off tomorrow.

Excuse me. I have to go. I do not see any need to keep you here any longer. Could we have just a couple or 3 minutes on either side of this question.

Could you folks tell me why you think we are either no better off or worse off. Professor Heymann, you tell me why you think we are better off, because it seems to me that is the question and that is the only reason I can see for some of those colleagues of mine who have been long-time civil libertarians saying, "Let's go with this bill that you find so devastating." They feel that we will be better off. They may be wrong, you know. But at least I feel they are conscientious. Give me a shot on this.

Mr. NEIER. Let me say very quickly I think we are worse off because the bill offers us a trade, and it is a trade in which we gain almost nothing and lose a great deal. What we gain in the trade is a warrant procedure, judicial scrutiny, but a warrant procedure that is nullified by the lack of notice and therefore the ability to challenge the grounds for the warrant; the limitations on what the warrant can possibly cover; the extraordinary judge shopping and appeal procedure which makes it more certain than ever that a warrant is going to be granted in this instance, and puts the courts into a position of ratifying executive decisions. What we lose is that for the first time in our history the Congress would be giving its stamp of approval to the intrusion of law enforcement, and law enforcement in its most intrusive guise, into areas of life of American citizens which are in and of themselves criminal.

That is losing an enormous amount, and it is especially losing an enormous amount at the hands of a committee which has just been established to look into this entire area, and which will begin its operations, its oversight operations, by giving away most of the show. Most of what we are concerned about in domestic spying would be legitimized in principle by this bill, and legitimized in practice in its most intrusive form.

Senator BAYH. Thank you.

Now Professor Heymann, if you please.

Professor HEYMANN. Senator Bayh, my prediction is that no court will ever deny the President the power to engage in electronic surveillance of someone who is working under the direction of a foreign government and engaged in anything like intelligence gathering. Even the court of appeals, the very liberal Court of Appeals of the District of Columbia, used much looser language indicating that collaborators could be electronically surveyed without probable cause by the President, even questioning whether a warrant would be necessary. So, on the one hand I see a picture of courts allowing any President and Attorney General less sensitive to civil liberties than President Ford and Attorney General Levi a very free hand.

On the other side, with the bill, I see a requirement of three approvals that can be made very real: an approval by the Attorney General; an approval by a court; and a monitoring, after the fact approval of each case over periods of time by this committee or by the Judiciary Committees of whether every electronic surveillance is limited to a person who has tied himself in to a foreign intelligence network. Now that requires a better definition in the area of clandestine intelligence. I see every American citizen who is involved in political dissent but knows that he is nowhere near being a member of a foreign spy network feeling that he can pick up the phone without worrying about the clicks, and he can talk in his bedroom without worrying about the bugs. I think that will be accomplished under this bill, and it will not be guaranteed without it.

Senator BAYH. I am awfully sorry, but I am going to miss that vote if I do not leave.

I trust that we will be in communication on this in the future.

Mr. NEIER. Mr. Chairman, we would like the privilege of submitting additional material.

Senator BAYH. Of course. I hope we will also be permitted additional interrogation.

Thank you all very much.

Whereupon, at 4:01 p.m., the subcommittee recessed, to reconvene upon the call of the Chair.

94TH CONGRESS  
2D SESSION

# S. 3197

[Report No. 94-1035]

## IN THE SENATE OF THE UNITED STATES

MARCH 23, 1976

Mr. KENNEDY (for himself, Mr. NELSON, Mr. MATHIAS, Mr. HUGH SCOTT, Mr. McCLELLAN, Mr. HRUSKA, Mr. BAYH, and Mr. ROBERT C. BYRD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 15, 1976

Reported, under authority of the order of the Senate of July 1, 1976, by  
Mr. KENNEDY, with amendments

JULY 19, 1976

Referred to the Select Committee on Intelligence, under authority of the order of June 16, 1976, for not to exceed 30 days

[Omit the part struck through and insert the part printed in *italic*]

## A BILL

To amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Foreign Intelligence Sur-  
4       veillance Act of 1976".

5       SEC. 2. Title 18, United States Code, is amended by  
6       adding a new chapter after chapter 119 as follows:

II—O

1 **"Chapter 120.—ELECTRONIC SURVEILLANCE WITH-**  
 2 **IN THE UNITED STATES FOR FOREIGN INTEL-**  
 3 **LIGENCE PURPOSES**

"Sec.

"2521. *Definitions.*

"2522. *Authorization for electronic surveillance for foreign intelligence purposes.*

"2523. *Designation of judges authorized to grant orders for electronic surveillance.*

"2524. *Application for an order.*

"2525. *Issuance of an order.*

"2526. *Use of information.*

"2527. *Report of electronic surveillance.*

"2528. *Presidential power.*"

4 **"§ 2521. Definitions**

5 **"(a) Except as otherwise provided in this section the**  
 6 **definitions of section 2510 of this title shall apply to this**  
 7 **chapter.**

8 **"(b) As used in this chapter—**

9 **"(1) 'Agent of a foreign power' means—**

10 **"(i) a person who is not a permanent resident**  
 11 **alien or citizen of the United States and who is**  
 12 **an officer or employee of a foreign power; or**

13 **"(ii) a person who, pursuant to the direction**  
 14 **of a foreign power, is engaged in clandestine in-**  
 15 **telligence activities, sabotage, or terrorist activities,**  
 16 **or who conspires with, assists or knowingly aids and**  
 17 **or abets such a person in engaging in such activities.**

18 **"(2) 'Electronic surveillance' means—**

19 **"(i) the acquisition, by an electronic, me-**

chanical, or other *surveillance* device, of the contents of a wire communication to or from a person in the United States, without the consent of any party thereto, where such acquisition occurs in the United States while the communication is being transmitted by wire;

“(ii) the acquisition, by an electronic, mechanical, or other *surveillance* device, of the contents of a radio ~~transmission~~ communication, without the consent of any party thereto, made, ~~with a reasonable expectation of privacy~~ under circumstances where a person has a constitutionally protected right of privacy and where both the point of origin sender and all intended recipients are located within the United States; or

“(iii) the installation of an electronic, mechanical, or other *surveillance* device in the United States to acquire information ~~not transmitted by~~ other than from a wire communication or radio communication under circumstances in which a person has a ~~reasonable expectation of privacy~~ constitutionally protected right of privacy.

“(3) ‘Foreign intelligence information’ means—

“(i) information ~~relating~~ deemed necessary to the ability of the United States to protect itself

1            against actual or potential attack or other hostile  
2            acts of a foreign power or its agents;

3            “(ii) information, with respect to foreign pow-  
4            ers or territories, which because of its importance is  
5            deemed essential (a) to the security or national  
6            defense of the Nation or (b) to the conduct of the  
7            foreign affairs of the United States; or

8            “(iii) information ~~relating~~ *deemed necessary*  
9            to the ability of the United States to protect the  
10           national security against foreign intelligence activi-  
11           ties.

12           “(4) ‘Attorney General’ means the Attorney General  
13           of the United States or in his absence the Acting Attorney  
14           General.

15           “(5) ‘Foreign power’ includes foreign governments,  
16           *factions of a foreign government, foreign political* parties,  
17           *foreign* military forces, or ~~agencies or instrumentalities of~~  
18           *enterprises controlled by* such entities, or organizations com-  
19           posed of such entities, whether or not recognized by the  
20           United States, or foreign-based terrorist groups.

21           **“§ 2522. Authorization for electronic surveillance for for-**  
22           **eign intelligence purposes**

23           “Applications for a court order under this chapter are  
24           authorized if the President has, by written authorization,  
25           empowered the Attorney General to approve applications to

1 Federal judges having jurisdiction under section 2523 of  
2 this chapter, and a judge to whom an application is made  
3 may grant an order, in conformity with section 2525 of this  
4 chapter, approving electronic surveillance of a foreign power  
5 or an agent of a foreign power for the purpose of obtaining  
6 foreign intelligence information.

7 **“§2523. Designation of judges authorized to grant orders**  
8 **for electronic surveillance**

9 “(a) The Chief Justice of the United States shall desig-  
10 nate seven district court judges, each of whom shall have  
11 jurisdiction to hear applications for and grant orders approv-  
12 ing electronic surveillance anywhere within the United States  
13 under the procedures set forth in this chapter.

14 “(b) The Chief Justice shall designate three judges,  
15 *one of whom shall be designated as the presiding judge*, from  
16 the United States district courts or courts of appeals who  
17 together shall comprise a special court of appeals which  
18 shall have jurisdiction to hear ~~an appeal~~ *appeals* by the  
19 United States from the denial of any application made under  
20 this chapter. The United States shall further have the right  
21 to appeal an affirmance of denial by that court to the Supreme  
22 Court. All appeals under this chapter shall be heard and  
23 determined as expeditiously as possible.

24 “(c) Applications made and orders granted under this  
25 chapter shall be sealed by the presiding judge and shall

1 be kept under security measures established by the Chief  
2 Justice in consultation with the Attorney General.

3 **“§ 2524. Application for an order**

4 “(a) Each application for an order approving electronic  
5 surveillance under this chapter shall be made in writing upon  
6 oath or affirmation to a judge having jurisdiction under sec-  
7 tion 2523 of this chapter. Each application must be approved  
8 by the Attorney General *upon his finding that it satisfies the*  
9 *criteria and requirements of such application as set forth*  
10 *in this chapter. It and* shall include the following information:

11 “(1) the identity of the officer making the  
12 application;

13 “(2) the authority conferred on the applicant by  
14 the President of the United States and the approval of  
15 the Attorney General to make the application;

16 “(3) the identity or a characterization of the per-  
17 son who is the subject of the electronic surveillance;

18 “(4) a statement of the facts and circumstances  
19 relied upon by the applicant to justify his belief that—

20 “(i) the target of the electronic surveillance  
21 is a foreign power or an agent of a foreign power  
22 and

23 “(ii) the facilities or the place at which the  
24 electronic surveillance is directed are being used,



1           or are about to be used, by a foreign power or an  
2           agent of a foreign power;

3           “(5) a statement of the procedures ~~by which the~~  
4           to minimize the acquisition and retention of informa-  
5           tion relating to permanent resident aliens or citizens of  
6           the United States that is ~~not foreign intelligence in-~~  
7           ~~formation will be minimized~~; *does not relate to the ability*  
8           *of the United States to protect itself against actual or*  
9           *potential attack or other hostile acts of a foreign power*  
10          *or its agents; to provide for the security or national*  
11          *defense of the Nation or the conduct of foreign affairs*  
12          *of the United States; or to protect the national security*  
13          *against foreign intelligence activities.*

14          “(6) a description of the type of information sought  
15          and a certification by the Assistant to the President for  
16          National Security Affairs or an executive branch official  
17          designated by the President from among those executive  
18          officers employed in the area of national security or  
19          defense and appointed by the President by and with the  
20          advice and consent of the Senate that ~~such the~~ informa-  
21          tion *sought* is foreign intelligence information, *that the*  
22          *purpose of the surveillance is to obtain foreign intelli-*  
23          *gence information and that such information cannot*  
24          *feasibly be obtained by normal investigative techniques;*

1       “(7) a statement of the means by which the sur-  
2       veillance will be effected;

3       “(8) a statement of the facts concerning all pre-  
4       vious applications known to the Attorney General that  
5       have been made to any judge under this chapter in-  
6       volving any of the persons, facilities, or places specified  
7       in the application, and the action taken on each pre-  
8       vious application; and

9       “(9) a statement of the period of time for which  
10      the electronic surveillance is required to be maintained.  
11      If the nature of the intelligence gathering is such that  
12      the approval of the use of electronic surveillance under  
13      this chapter should not automatically terminate when the  
14      described type of information has first been obtained, a  
15      description of facts supporting the belief that additional  
16      information of the same type will be obtained thereafter.

17      “(b) The Attorney General may require any other affi-  
18      davit or certification from any other officer in connection with  
19      the application.

20      “(c) ~~At the time of the hearing on the application, the~~  
21      ~~applicant may furnish to the judge additional information in~~  
22      ~~support of the application and~~ The judge may require the  
23      applicant to furnish such other information or evidence as  
24      may be necessary to make the determinations required by  
25      section 2525 of this ~~title~~ chapter.

1   **“§ 2525. Issuance of an order**

2       “(a) Upon an application made pursuant to section  
3   2524 of this title, the judge shall enter an ex parte order  
4   as requested or as modified approving the electronic sur-  
5   veillance if he finds that—

6       “(1) the President has authorized the Attorney  
7   General to approve applications for electronic surveil-  
8   lance for foreign intelligence information;

9       “(2) the application has been approved by the  
10   Attorney General;

11       “(3) on the basis of the facts submitted by the ap-  
12   plicant there is probable cause to believe that:

13       “(i) the target of the electronic surveillance is  
14   a foreign power or an agent of a foreign power; and

15       “(ii) the facilities or place at which the elec-  
16   tronic surveillance is directed are being used, or are  
17   about to be used, by a foreign power or an agent of  
18   a foreign power;

19       “(4) minimization procedures to be followed are  
20   reasonably designed to minimize the acquisition and  
21   retention of information relating to permanent resident  
22   aliens or citizens of the United States that is ~~not foreign~~  
23   ~~intelligence information~~; *does not relate to the ability*  
24   *of the United States to protect itself against actual or*  
25   *potential attack or other hostile acts of a foreign power*

1        *or its agents; to provide for the security or national*  
2        *defense of the Nation or the conduct of foreign affairs*  
3        *of the United States; or to protect the national security*  
4        *against foreign intelligence activities;*

5                “(5) certification has been made pursuant to sec-  
6        tion 2524 (a) (6) that the information sought is foreign  
7        intelligence information, that *the purpose of this surveil-*  
8        *lance is to obtain such foreign intelligence information*  
9        *and that such information cannot feasibly be obtained by*  
10       normal investigative techniques.

11       “(b) An order approving an electronic surveillance  
12       under this section shall—

13                “(1) specify—

14                “(i) the identity or a characterization of the  
15       person who is the subject of the electronic surveil-  
16       lance;

17                “(ii) the nature and location of the facilities or  
18       the place at which the electronic surveillance will be  
19       directed;

20                “(iii) the type of information sought to be  
21       acquired;

22                “(iv) the means by which the electronic sur-  
23      veillance will be effected; and

24                “(v) the period of time during which the elec-  
25       tronic surveillance is approved; and

1       “(2) direct—

2               “(i) that the minimization procedures be fol-  
3       lowed;

4               “(ii) that, upon the request of the applicant,  
5       a specified communication or other common carrier,  
6       landlord, custodian, contractor, or other specified  
7       person furnish the applicant forthwith any and all  
8       information, facilities, or technical assistance; ~~or~~  
9       ~~other aid~~ necessary to accomplish the electronic sur-  
10      veillance in such manner as will protect its secrecy  
11      and produce a minimum of interference with the  
12      services that such carrier, landlord, custodian, con-  
13      tractor, or other person is providing that target of  
14      electronic surveillance; and

15              “(iii) that the applicant compensate, at the  
16      prevailing rates, such carrier, landlord, custodian,  
17      or other person for furnishing such aid.

18      “(c) An order issued under this section may approve  
19      an electronic surveillance for the period necessary to achieve  
20      its purpose, or for ninety days, whichever is less. Extensions  
21      of an order issued under this chapter may be granted upon  
22      an application for an extension made in the same manner as  
23      required for an original application and after findings re-  
24      quired by subsection (a) of this section. Each extension may

1 be for the period necessary to achieve the purposes for which  
2 it is granted, or for ninety days, whichever is less.

3 “(d) Notwithstanding any other provision of this  
4 chapter when the Attorney General reasonably determines  
5 that—

6 “(1) an emergency situation exists with respect  
7 to the employment of electronic surveillance to obtain  
8 foreign intelligence information before an order au-  
9 thorizing such surveillance can with due diligence be  
10 obtained, and

11 “(2) the factual basis for issuance of an order under  
12 this chapter to approve such surveillance exists,  
13 he may authorize the emergency employment of electronic  
14 surveillance if a judge designated pursuant to section 2523  
15 of this title is informed by the Attorney General or his desig-  
16 nate at the time of such authorization that the decision has  
17 been made to employ emergency electronic surveillance  
18 and if an application in accordance with this chapter is made  
19 to that judge as soon as practicable, but not more than  
20 twenty-four hours after the Attorney General authorizes  
21 such acquisition. In the absence of a judicial order approv-  
22 ing such electronic surveillance, the surveillance shall ter-  
23 minate when the information sought is obtained, when the  
24 application for the order is denied, or after the expiration  
25 of twenty-four hours from the time of authorization by the

1 Attorney General, whichever is earliest. *In the event that*  
 2 *such application for approval is denied, or in any other*  
 3 *case where the electronic surveillance is terminated without*  
 4 *an order having been issued, no information obtained or*  
 5 *evidence derived from such surveillance shall be received in*  
 6 *evidence or otherwise disclosed in any trial, hearing or other*  
 7 *proceeding in or before any court, grand jury, department,*  
 8 *office, agency, regulatory body, legislative committee or other*  
 9 *authority of the United States, a State, or a political sub-*  
 10 *division thereof.* As provided in section 2523, a denial of  
 11 the application may be appealed by the Attorney General.

12 “(e) A judge denying an order under this section or  
 13 a panel affirming such denial under section 2523 (b) shall  
 14 state the reasons therefor. \* f ,

15 **“§ 2526. Use of information**

16 “(a) Information acquired from an electronic surveil-  
 17 lance conducted pursuant to this chapter may be used by  
 18 and disclosed by to Federal officers and employees only  
 19 for the purposes designated under this chapter set forth in  
 20 ~~section 2521 (b) (3) of this chapter~~ relating to the ability  
 21 of the United States to protect itself against actual or  
 22 potential attack or other hostile acts of a foreign power or  
 23 its agents; to provide for the security or national defense  
 24 of the Nation or the conduct of foreign affairs of the United  
 25 States; or to protect the national security against foreign

1 *intelligence activities* or for the enforcement of the criminal  
2 *law. No otherwise privileged communication obtained in*  
3 *accordance with or in violation of, the provisions of this*  
4 *chapter shall lose its privileged character.*

5 “(b) The minimization procedures required under this  
6 chapter shall not preclude the retention and disclosure of  
7 *information which is not nonforeign intelligence information*  
8 *acquired incidentally which is evidence of a crime.*

9 “(c) ~~When information acquired from or the product~~  
10 ~~of an electronic surveillance conducted pursuant to this~~  
11 ~~chapter is received in evidence in any trial, proceeding, or~~  
12 ~~other hearing in any Federal or State court, the provisions~~  
13 ~~of section 2518 (9) of chapter 110 shall not apply. No other-~~  
14 ~~wise privileged communication obtained in accordance with,~~  
15 ~~or in violation of the provisions of this chapter shall lose its~~  
16 ~~privileged character.~~

17 “(c) *No information obtained or derived from an elec-*  
18 *tronic surveillance shall be received in evidence or otherwise*  
19 *used or disclosed in any trial, hearing, or other proceeding*  
20 *in a Federal or State court unless, prior to the trial, hear-*  
21 *ing, or other proceeding or at a reasonable time prior to an*  
22 *effort to disclose the information or submit it in evidence in*  
23 *the trial, hearing, or other proceeding, the Government noti-*  
24 *fies the court of the source of the information and the court,*  
25 *in camera and ex parte, determines that the surveillance was*



1 *authorized and conducted in a manner that did not violate*  
2 *any right afforded by the Constitution and statutes of the*  
3 *United States to the person against whom the evidence is to*  
4 *be introduced. In making such a determination, the court,*  
5 *after reviewing a copy of the court order and accompany-*  
6 *ing application in camera, may order disclosed to the person*  
7 *against whom the evidence is to be introduced the order and*  
8 *application, or portions thereof, only if it finds that such*  
9 *disclosure would substantially promote a more accurate*  
10 *determination of the legality of the surveillance and that such*  
11 *disclosure would not harm the national security.*

12       “(d) *Any person who has been a subject of electronic*  
13 *surveillance and against whom evidence derived from such*  
14 *electronic surveillance is to be, or has been, introduced or*  
15 *otherwise used or disclosed in any trial, hearing, or pro-*  
16 *ceeding in or before any court, department officer, agency,*  
17 *regulatory body, or other authority of the United States, a*  
18 *State, or a political subdivision thereof, may move to sup-*  
19 *press the contents of any communication acquired by elec-*  
20 *tronic surveillance, or evidence derived therefrom, on the*  
21 *grounds that—*

22               “(i) *the communication was unlawfully inter-*  
23 *cepted;*

24               “(ii) *the order of authorization or approval under*  
25 *which it was intercepted is insufficient on its face; or*

1           “(iii) the interception was not made in conformity  
2           with the order of authorization or approval.

3   Such motion shall be made before the trial, hearing, or pro-  
4   ceeding unless there was no opportunity to make such mo-  
5   tion or the person was not aware of the grounds of the motion.  
6   If the motion is granted, the contents of the communica-  
7   tion acquired by electronic surveillance or evidence derived  
8   therefrom shall be suppressed. The judge, upon the fil-  
9   ing of such motion may in his discretion make available to  
10   the person or his counsel for inspection such portions of the  
11   intercepted communication or evidence derived therefrom  
12   as the judge determines to be in the interests of justice and  
13   the national security.

14       “~~(d)~~ (e) If an emergency employment of the elec-  
15   tronic surveillance is authorized under section 2525(d) and  
16   a subsequent order approving the surveillance is not ob-  
17   tained, the judge shall cause to be served on any United  
18   States citizen or permanent resident alien named in the  
19   application and on such other United States citizen or per-  
20   manent resident alien subject to electronic surveillance as  
21   the judge may determine in his discretion it is in the interest  
22   of justice to serve, notice of—

23           “(1) the fact of the application;

24           “(2) the period of the surveillance; and

1           “(3) the fact that during the period *foreign intel-*  
2       *ligence* information was or was not obtained.

3       On an ex parte showing of good cause to the judge the  
4       serving of the notice required by this subsection may be  
5       postponed or suspended for a period not to exceed ninety  
6       days. Thereafter, on a further ex parte showing of good  
7       cause, the court shall forgo ordering the serving of the  
8       notice required under this subsection.

9       **“§2527. Report of electronic surveillance**

10       “In April of each year, the Attorney General shall  
11       report to the Administrative Office of the United States  
12       Courts and shall transmit to the Congress with respect to the  
13       preceding calendar year—

14           “(1) the number of applications made for orders  
15       and extensions of orders approving electronic surveil-  
16       lance and the number of such orders and extensions  
17       granted, modified, and denied;

18           “(2) the periods of time for which applications  
19       granted authorized electronic surveillances and the actual  
20       duration of such electronic surveillances;

21           “(3) the number of such surveillances in place at  
22       any time during the preceding year; and

23           “(4) the number of such surveillances terminated  
24       during the preceding year.

1   **"§ 2528. Presidential power**

2       **"Nothing contained in this chapter shall limit the con-**  
3   **stitutional power of the President to order electronic sur-**  
4   **veillance for the reasons stated in section 2511(3) of title**  
5   **18, United States Code, if the facts and circumstances giving**  
6   **rise to such order are beyond the scope of this chapter."**

7       *"Nothing contained in chapter 119, section 605 of the*  
8   *Communications Act of 1934, or this chapter shall be*  
9   *deemed to affect the exercise of any constitutional power the*  
10   *President may have to acquire foreign intelligence informa-*  
11   *tion by means of an electronic, mechanical, or other surveil-*  
12   *lance device if:*

13           *"(a) such acquisition does not come within the*  
14   *definition of electronic surveillance in paragraph (2) of*  
15   *subsection (b) of section 2521 of this chapter, or*

16           *"(b) the facts and circumstances giving rise to the*  
17   *acquisition are so unprecedented and potentially harm-*  
18   *ful to the Nation that they cannot be reasonably said to*  
19   *have been within the contemplation of Congress in enact-*  
20   *ing this chapter or chapter 119; Provided, That in such*  
21   *an event, the President shall, within a reasonable time*  
22   *thereafter, transmit to the Committees on the Judiciary of*  
23   *the Senate and House of Representatives, under a written*  
24   *injunction of secrecy if necessary, a statement setting*  
25   *forth the nature of such facts and circumstances.*

1 *Foreign intelligence information acquired by authority of the*  
2 *President in the exercise of the foregoing powers may be*  
3 *received in evidence in any trial, hearing, or other proceeding*  
4 *only where such acquisition was reasonable, and shall not be*  
5 *otherwise used or disclosed except as is necessary to implement*  
6 *that power.”.*

7     *SEC. 3. The provisions of this Act and the amendment*  
8 *made hereby shall become effective upon enactment: Provided,*  
9 *That, any electronic surveillance approved by the Attorney*  
10 *General to gather foreign intelligence information shall not*  
11 *be deemed unlawful for failure to follow the procedures of*  
12 *chapter 120, title 18, United States Code, if that surveillance*  
13 *is terminated or an order approving that surveillance is*  
14 *obtained under this chapter within sixty days following the*  
15 *designation of the first judge pursuant to section 2523 of*  
16 *chapter 120, title 18, United States Code.*

17     *SEC. 4. Chapter 119 of title 18, United States Code, is*  
18 *amended as follows:*

19     *(a) Section 2511(1) is amended by inserting the words*  
20 *“or chapter 120” after the word “chapter”.*

21     *(b) Section 2511(2)(a)(ii) is amended by inserting*  
22 *the words “or chapter 120” after both appearances of the*  
23 *word “chapter;” and by adding at the end of the section the*  
24 *following provision: “Provided, however, That before the*  
25 *information, facilities, or technical assistance may be pro-*

1 vided, the investigative or law enforcement officer shall fur-  
2 nish to the officer, employee, or agency of the carrier either—

3       “(1) an order signed by the authorizing judge  
4       certifying that a court order directing such assistance  
5       has been issued, or

6       “(2) in the case of an emergency surveillance as  
7       provided for in section 2518(7) of this chapter or sec-  
8       tion 2525(d) of chapter 120, or a surveillance conducted  
9       under the provisions of section 2528(b) of chapter 120,  
10      a sworn statement by the investigative or law enforce-  
11      ment officer certifying that the applicable statutory re-  
12      quirements have been met,

13     and setting forth the period of time for which the surveil-  
14     lance is authorized and describing the facilities from which  
15     the communication is to be intercepted. Any violation of this  
16     subsection by a communication common carrier or an officer,  
17     employee, or agency thereof, shall render the carrier liable  
18     for the civil damages provided for in section 2520.

19     (c) Section 2511(2) is amended by adding at the end  
20     of the section the following provision:

21       “(e) It shall not be unlawful under this chapter or  
22     chapter 120, or section 605 of the Communications Act of  
23     1934 for an officer, employee, or agent of the United States,  
24     in the normal course of his official duty, to conduct elec-  
25     tronic surveillance as defined in section 2521(2)(ii) of

1 chapter 120, for the sole purpose of determining the ca-  
2 pability of equipment used to obtain foreign intelligence  
3 or the existence or capability of equipment used by a foreign  
4 power or its agents: Provided, (1) that the test period shall  
5 be limited in extent and duration to that necessary to deter-  
6 mine the capability of the equipment, but in no event shall  
7 exceed ninety days; and (2) that the content of any com-  
8 munication acquired under this section shall be retained and  
9 used only for the purpose of determining the existence or  
10 capability of such equipment, shall be disclosed only to the  
11 officers conducting the test or search, and shall be destroyed  
12 upon completion of the testing or search period.”.

13 (d) Section 2511(3) is repealed.

14 (e) Section 2515 is amended by adding at the end of  
15 the section the words “or chapter 120”.

16 (f) Section 2518(1) is amended by inserting the words  
17 “under this chapter” after the word “communication”.

18 (g) Section 2518(4) is amended by inserting the words  
19 “under this chapter” after both appearances of the words  
20 “wire or oral communication”.

21 (h) Section 2518(9) is amended by striking the word  
22 “intercepted” and inserting the words “intercepted pursuant  
23 to this chapter” after the word “communication”.

24 (i) Section 2518(10) is amended by striking the word  
25 “intercepted” and inserting the words “intercepted pursuant

1 to this chapter" after the first appearance of the word  
2 "communication".

3 (j) Section 2519(3) is amended by inserting the words  
4 "pursuant to this chapter" after the words "wire or oral  
5 communications" and after the words "granted or denied".

6 (k) Section 2520 is amended by—

7 (1) inserting the words, "other than an agent of a  
8 foreign power as defined in section 2521(b)(1)(i) of  
9 chapter 120" after the first appearance of the word  
10 "person";

11 (2) inserting the words "or chapter 120" after the  
12 word "chapter".



LETTER TO SENATOR BIRCH BAYH FROM SENATOR WALTER F. MONDALE, JULY 12, 1976

DEAR BIRCH: Let me first express my appreciation for being given the opportunity to present my views on S. 3197 in testimony before the Subcommittee on Intelligence Activities and the Rights of Americans. As I said at the time, your Subcommittee and the full Committee may face no more important question, than that of the authority to be given the executive branch to conduct intelligence activities affecting the rights of American citizens. I found the discussion very worthwhile, and I am confident that the new Committee will effectively deal with the key issues that were raised concerning the proposed wiretap legislation.

I promised to comment further by letter on several of these issues.

The first such issue concerns the present disclaimer regarding the President's inherent powers. I have studied it carefully and must reluctantly conclude that it goes too far acknowledging that the President may have the inherent power to violate the Bill of Rights. I note that this disclaimer would improve upon the disclaimer which currently exists in Title III; nonetheless, I believe it unnecessary and unwise. I support the need to authorize the activities of the National Security Agency. But this can be done in some other manner and without resorting to such a sweeping endorsement of the idea that the President may act outside of the constitutional framework of this Government.

This is not to quarrel with the concept of inherent Presidential power to collect intelligence on foreigners, on foreign governments and foreign activities. But I believe there is no inherent Presidential authority to conduct surveillance against Americans in violation of the first and fourth amendments of the Bill of Rights. Indeed, that is why we have the Bill of Rights. Our founding fathers adopted these rights in the face of profound threats of foreign subversion to our young country. They were willing to side with liberty then; we can do no less now.

The one evident purpose of this disclaimer is to permit the National Security Agency to continue its activities abroad. However, the Bill would also make it possible for the National Security Agency to target Americans. It is my understanding that the NSA does not want this job nor this authority. Why the Justice Department insists that this be permitted deserves clarification by the Committee. If the NSA is to target Americans and their communications or specifically to cull out data on Americans from NSA's other efforts, this should be done only in accord with the same warrant provisions established by the rest of this legislation.

The second major issue is what standard should be set which would permit a warrant to conduct electronic surveillance against Americans. I welcome Attorney General Levi's flexibility in trying to achieve a more precise definition of the term "clandestine intelligence activity" which would justify electronic surveillance.

It is my understanding that the Attorney General would define clandestine intelligence activity as spying—persons who are part of a "foreign spy network." I believe that this goes in the right direction to clarify what is intended. At the same time, I have two observations—first, the Committee should establish whether "spying" means only the collection of information and its transmittal or would encompass the concept of "an agent of influence" which was the justification for the surveillance aimed at Martin Luther King.

The Committee should clarify what is meant in "being a part" of a spy network "under the direction of a foreign power." American citizens have the right to deal with foreign governments and agencies and to represent them in legitimate businesses and other public activities. To avoid confusion, the Committee should consider applying the same strict definition of who is to be regarded as a part of a foreign spy network as the CIA uses in determining who is an American agent.

By CIA's definition an agent must be under positive control. He cannot be a simple contact or even someone who may collaborate with the United States in intelligence operations. Rather he must be someone who is not only fully witting of the clandestine relationship, but who has a contractual relationship, who is paid and takes assignments for being paid. Such a strict standard will help eliminate any possibility that this provision could be used to conduct surveillance against Americans who deal legitimately with foreign governments such as lawyers, businessmen or leaders of ethnic organizations.

A third major problem, closely related to the above is whether electronic surveillance breaching the first and fourth amendments of the Bill of Rights should be allowed absent any transgression of law. In my view, a criminal standard for allowing electronic surveillance is essential to the health of our governmental system.

I do not believe we should accept the idea that some activities can be so harmful and dangerous to this country that the first and fourth amendments to the Bill of Rights can be waived aside, and yet these activities should not be a violation of law. The theory that anything else, even an important government interest, should be allowed to override the rights of the American people is extremely dangerous. The whole history of intelligence activity shows that such a standard would inevitably broaden and become looser with time.

In my view, it is also dangerous to set such a precedent. The Justice Department cited, as a precedent for this Bill, the case of warrants being issued for entry into a person's property on the probable cause that they were violating building codes. If that trivial example can be cited as precedent for wiretapping, bugging, and surreptitious entry, what further precedent would this legislation itself set? What broader intrusions upon our liberties will it serve to legitimize?

A criminal standard is practical, too. Why should being part of a foreign spy network be legal? Under our laws, for example, an American citizen cannot join a foreign military service without losing United States citizenship. I see no reason why Americans should be permitted to pledge their allegiance to the clandestine service of a foreign power without also suffering legal sanctions. I have carefully studied the contingencies the Department of Justice and the FBI have said might justify electronic surveillance against Americans. I believe they all should be covered by legislative prohibitions.

I am convinced that we should set the criminal standard for electronic surveillance with all the protections of due process in the criminal law that this would entail. Without it we are on a slippery slope to evermore intrusive government surveillance of its citizens.

I recognize the Espionage Law is out of date. It should be modernized. Since there is clearly not enough time to do so before this Bill is acted upon, I recommend that the Committee consider authorizing electronic surveillance in cases not yet covered by a criminal standard—for a period of only two years. This should provide sufficient time to revise the criminal statutes, particularly as they apply to espionage. During this period, however, the Justice Department should be required to state publicly those activities which may lead Americans to be targeted for electronic surveillance.

Limiting such authority to a two-year trial period is extremely important to the future work of the Senate Select Committee. By tackling foreign intelligence electronic surveillance, your Committee is dealing with the hardest case first. The Committee will in all likelihood go on to develop charters for other intelligence agencies and activities—for the National Security Agency, the FBI, for the standards for informers, for the authorization of other types of domestic intelligence operations. It is important to guard against setting precedents that will narrow the Committee's options and create unforeseen difficulties later on. The concept that the Federal Government can trespass upon the first and fourth amendments when no crime has been committed will become particularly troublesome when you grapple with the issues related to domestic intelligence and the protection of intelligence sources and methods. I believe a time limit would be a prudent precaution to ensure against unanticipated problems and consequences of this legislation.

I fully recognize the complexity and difficulty of the issues you are facing. The choice between security and liberty is never an easy one. At every critical turning point in this nation's history we have always sided with liberty. And this, I believe, is what has distinguished us from all the other nations on earth. This is a heritage we must safeguard with care.

You have my best wishes.

AMENDMENTS TO S. 3197, "THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1976," PROPOSED BY SENATOR JOHN V. TUNNEY, JULY 6, 1976

PAGE 2

Line 12, strike present language and insert: "an official of the government, or a member of the military, diplomatic, or intelligence services, of a foreign power, and who is engaged in activity hostile to the interests of the United States; *Provided*, that diplomatic agents as defined by the Vienna Convention on Diplomatic Relations be included within this definition only to the extent consistent with our treaty obligations, (as provided by § 2529).

Line 14, insert after "foreign power" (see alternative language at end): "as a knowing, secret, member of a foreign intelligence service,"

Lines 16 and 17, strike existing language and insert: "which violates Federal or state law"

Lines 23-24, delete: "where such acquisition occurs in the United States".

## PAGE 3

Line 7-9, delete language beginning "and where" and ending with "the United States".

Line 12, delete "information" and insert "the contents of a conversation".

Line 16, at end, insert "Provide that other surveillance devices may be utilized only to the extent they do not violate the Constitutional right of privacy or other rights afforded by the Constitution of the United States".

Line 18, after information, insert: "with respect to foreign powers or territories,"

Line 20, before "hostile" insert "similarly grave".

Line 24, before "security" insert "military".

Line 24, delete: "(a) :

## PAGE 4

Lines 1 and 2, delete: "(b) to the conduct of the foreign affairs of the United States; or".

Line 9, add at end: "Notwithstanding any other provision of law, the authority vested by this chapter in the Attorney General may not be delegated."

Line 11, after "foreign political parties" add: "which are principal parties of foreign governments and exercise governmental powers".

Line 15, after line add: "(6) "Minimization procedure" means procedures to minimize the acquisition of information that is not foreign intelligence information, to assure that information which is not foreign intelligence information not be maintained, and to assure that information obtained not be used except by Federal officers and not be disclosed except to Federal officers as set forth in section 2526".

## PAGE 5

Lines 5-9, delete existing language and insert: (i) "Each district court shall designate from time to time one or more district judges to hear applications for and grant orders approving electronic surveillance within that district under the procedures set forth in this chapter".

(Alternative language: (i) The Judicial Council of each circuit shall designate one or more district judges to hear applications for and grant orders approving electronic surveillance within that circuit under the procedures set forth in this chapter.").

Line 9, after insert:

"(ii) Such designations shall be by public order and for fixed terms. No judge shall be eligible to be re-designated immediately upon the completion of a prior designation. If more than judge is designated within a district (circuit), the district court (Judicial Council) shall by order designate, by rotation or otherwise, to which judge any given application shall be presented."

(iii) The United States District Court in the District of Columbia is granted jurisdiction to hear and determine applications for electronic surveillance, outside the territorial borders of the United States, of United States citizens and permanent resident aliens.

Lines 10-19, delete existing language and insert:

(i) "Each Court of Appeals shall designate from time to time a panel of three Circuit Judges to hear appeals from orders made on applications under this chapter." (Alternative language: (i) "The Judicial Council of the District of Columbia Circuit shall designate three Circuit Judges to be the panel which shall have exclusive jurisdiction to hear appeals from orders made on applications under this chapter."

Line 19, after line insert:

(ii) "Such designations shall be by public order and shall be for fixed terms, which shall be of overlapping lengths. No judge shall be eligible to be re-designated immediately upon the completion of a prior designation.

Line 19, following prior insert:

(iii) "The United States Supreme Court shall have jurisdiction to review cases under this chapter by writ of certiorari.

Line 19, following prior inserts:

(iv) "Temporary authorizations pending decision on an appeal may be made by a district or individual circuit judge designated to act under this chapter, within his jurisdiction, or by a Supreme Court Justice.

Line 19, following prior inserts:

(d) "A judge or court hearing an application under this chapter, or an appeal thereon, shall appoint an attorney amicus curiae to present the arguments opposing said application. Such an attorney may be a Federal Public Defender or his deputy, or if not, shall be compensated as if appointed under Section 3006A of Title 18, U.S. Code. Appointments and service of such attorneys shall be within security guidelines established by the Judicial Conference of the United States. Such attorney may file an appeal or petition for a writ of certiorari as if he represented a party.

Lines 22-23, delete language after "established by the" and insert "Judicial Conference of the United States."

#### PAGE 6

Line 10, change semicolon to comma and add: "and the statutory jurisdiction of the officer to conduct an investigation requiring such surveillance."

Line 14, after "the identity" insert: "; if known, if not then".

Line 24, after line insert:

(iii) particularly described information will be acquired by such electronic surveillance, and such information is foreign intelligence information.

(iv) such information cannot feasibly be obtained by normal investigative techniques, and gathering such information by electronic surveillance will not constitute an unreasonable intrusion on the privacy of the persons likely to use the facilities or place at which the electronic surveillance is directed.

Line 24, after above insert, add:

(v) that the obtaining of such information is consistent with the treaty obligations of the United States, including the reciprocal obligations of the Vienna Convention on Diplomatic Relations, as provided in section 2529.

#### PAGE 7

Lines 2-10, delete: from "relating to" through "foreign intelligence activities" and insert: "that is not foreign intelligence information."

Line 12, delete: "certification" and insert: "statement under oath of facts and circumstances relied upon by".

Lines 12-17, delete language: from "the Assistant to the President" through "advice and consent of the Senate" and insert: "the Secretary of State or the Secretary of Defense, or in the absence of either, the Acting Secretary of State or Acting Secretary of Defense."

Line 17, before "that the information" insert: "to justify his belief that".

#### PAGE 8

Line 1, strike the words: "under this chapter".

Line 24, strike "shall" and insert "may".

#### PAGE 9

Line 2, after line insert:

(1) the officer making the application is acting within the officer's statutory jurisdiction to conduct an investigation requiring such surveillance.

(Renumber sections 1 to 5 as 2 through 6).

Line 6, after "(2)" add: the President has conferred authority on the applicant to make the application and".

Line 15, after line insert:

(iii) particularly described information will be acquired by such electronic surveillance, and such information is foreign intelligence information.

(iv) such information cannot feasibly be obtained by normal investigative techniques, and gathering such information by electronic surveillance will not constitute an unreasonable intrusion on the privacy of the persons likely to use the facilities or place at which the electronic surveillance is directed.

Lines 18 to line 2 on page 10, delete: from "relating to" through "foreign intelligence activities" and insert: "that is not foreign intelligence information".

Line 24 to line 1 on page 10, delete: "or the conduct of foreign affairs of the United States".

#### PAGE 10

Line 12, after: "the identity", strike "or" and insert: "if known, or if not then".

## PAGE 11

Line 6, after "person" insert "may".

Line 19, delete "ninety" and insert "fifteen".

Lines 18-23, delete sentence and insert: "An application for extension shall contain: (i) a current statement of all the facts and current certifications, as were required for the original application; (ii) a statement of whether any foreign intelligence was obtained during the original period and why an extension is required; (iii) information sufficient for the judge to determine that the acquisition, retention, use and disclosure of the information acquired by the surveillance has been fully consistent with the minimization procedures the judge has ordered and the restrictions imposed by section 2526(a).

Line 23, before "Each extension" insert:

"The judge may grant an extension if he makes the same findings as for an original application, and also that, taking account of whether foreign intelligence information has been previously obtained, there is need for a renewal, and also that the acquisition, retention, use and disclosure of the information acquired by the surveillance has been fully consistent with the minimization procedures the judge has ordered and the restrictions imposed by section 2526(a)."

## PAGE 12

Line 2, delete "ninety" and insert "fifteen".

Line 21, after such acquisition insert: "If the Attorney General authorizes such emergency employment of electronic surveillance he shall impose minimization procedures on the acquisition, retention, use, and disclosure of information obtained, as provided in this chapter."

## PAGE 13

Line 10, after "thereof" delete period and insert: ", nor shall such information be disclosed elsewhere".

Line 10, delete "a denial of" and insert: "action upon".

Line 11, delete "by the Attorney General".

Lines 12-14, delete present language and substitute:

"(f) A judge or an appellate court acting upon an application under this chapter shall state the reasons therefore. All such statements of reason shall be made available to all judges designated to hear applications or appeals thereon under this chapter, and as much of said statements of opinion as may be made public consistent with the national security shall be published within a reasonable time, as directed by the judge or court."

Line 14, after line add:

"(f) Upon the expiration of any original period of surveillance, and upon the expiration of any renewal thereof, and upon the termination of any emergency employment of surveillance, under this chapter, the officer making the application and the Attorney General shall make a report to the judge on compliance with minimization procedures on acquisition, retention, use and disclosure of the information obtained, and on compliance with section 2526(a). The judge shall obtain such further information as is useful and shall conduct such review as is helpful to determine whether the acquisition, retention, use and disclosure of information from the electronic surveillance has been consistent with the judge's order, this chapter, and other provisions of law. If grounds therefore are shown, the judge may conduct contempt proceedings or refer his findings to a grand jury."

Line 18, at end of line, add: "and may be so used and disclosed only".

Line 18, insert after "only" (and before other insertion): "only to the extent consistent with the minimization procedures ordered by the judge under this chapter."

Line 22, before "hostile", insert "similarly grave".

Line 24-line 1 on page 14, delete: "or the conduct of foreign affairs of the United States".

## PAGE 14

Line 7, after "disclosure" insert "to Federal officers".

Line 9, delete "which is evidence of a crime" and insert: "to prevent the commission or continuation of an imminent crime of violence".

## PAGE 15

Line 1, delete "in camera and ex parte".

Lines 4-5, strike: "to the person against whom the evidence is to be introduced".

Line 5, after "introduced", strike "In making" and insert: "If only information which is the remote product of an electronic surveillance is sought to be introduced, then in making".

Line 9, strike "only".

Line 10, strike "substantially".

Line 12, after line add:

"Provided however, That if the contents obtained from an electronic surveillance or information which is the direct product thereof, is sought to be introduced, then the court must disclose the court order and accompanying application, and the material sought to be introduced, to the person against whom the evidence is to be introduced, and shall conduct an adversary hearing in making the determination that the surveillance was authorized and conducted in a manner that did not violate any right afforded by the Constitution and statutes of the United States.

## PAGE 16

Line 1, after "(ii)" insert: "the application or".

Line 2, delete: "on its face".

Line 11, delete "may in his discretion" and insert "shall".

Lines 14-15, delete: "and the national security".

Lines 21-22, after "such other" delete: "United States citizen or permanent resident alien" and insert: "person".

## PAGE 17

Line 14, after line insert:

(a) as a public document:

Line 25, after line insert:

(b) as a confidential communication, (i) copies of all applications made, reports on compliance with minimization orders, judicial orders entered, and statements of reasons by judges and courts in acting thereon, deleting identifying data which would violate any person's right of privacy, unless such data is specifically requested by a committee of the Congress.

(2) description of the benefits to the interests of the United States derived from such electronic surveillance, and the total costs of conducting such surveillance including time of government employees involved.

(3) description of the technology utilized to conduct such surveillance.

## PAGE 18

Line 1-line 6 on page 19, delete present language and insert:

(a) This chapter is enacted by the Congress as an exercise of its authority to make all laws which shall be necessary and proper for carrying into execution the powers vested in the Congress and all other powers vested by the Constitution in the Government of the United States, or in any Department or officer thereof.

(b) No electronic surveillance in the United States, or against United States citizens and permanent resident aliens, is authorized except in compliance with chapter 119 or this chapter."

## PAGE 19

Line 6, insert:

(c) "This chapter does not grant any authority in addition to that contained in existing law for investigations to provide the basis for applications for electronic surveillance, nor for investigation of non-criminal activity, nor for warrantless surreptitious entries, mail openings, or other infringements of the Constitutional right to privacy."

Line 12, after line insert: "had commenced prior to the enactment of this chapter and".

## PAGE 20

Line 3, delete "order" and insert "certificate".

Lines 8-9, delete all language after first comma.

Line 15, after line insert:

"No communications carrier nor any officer, employee, or agency thereof may furnish facilities for, nor cooperate in the conduct of, electronic surveillance, except in accordance with the provisions of Chapter 119 and this chapter; and

said carriers, officers, employees, and agencies shall promptly report in writing to the Attorney General and to the proposed target any request to furnish such facilities or cooperation which is not accompanied by a judicial certificate, or in the case of section 2518(7) and 2525(d) in which a judicial certificate of approval, disapproval, or receipt of an application is not presented within 48 hours of the initial request to furnish such facilities or cooperation.

Line 19—line 11 on page 21, delete (renumber sections (d) through (l) as (c) through (k).

PAGE 22

Lines 9 through 12, delete.

Line 13, delete "(2)".

NEW SECTION 2529

"This act does not repeal or supersede the terms of the Vienna Convention on Diplomatic Relations. When an application is submitted for electronic surveillance of a nation's diplomatic agent, his residence or its mission, or its official correspondence which are declared "inviolable" by the terms of Articles 22 (1) and (3), 27(2) and 30 (1) and (2) of that Convention, the court shall determine whether the United States is free under the provisions of international law, including Article 47(2)(a) of the Convention, to conduct such surveillance.

PAGE 2

Lines 13-17, alternative language: a person who (a) acting under the control of a foreign power, as a knowing member of a foreign intelligence service, (b) without disclosing he has a relationship to the foreign power, (c) with the purpose of benefiting a foreign power and causing detriment to the United States, (d) uses clandestine methods (e) to acquire non-public information concerning industrial methods of vital importance to the national defense, or concerning third nations vitally affecting our foreign relations, to commit the crime of sabotage, or to commit crimes of violence as part of terrorist activities, (e) in violation of the laws of the United States or of a State. (f) Provided, however, that this definition does not include political activity, collecting or transmitting political information, or activity protected by the Constitution of the United States.

#### THE ADMINISTRATION'S WIRETAP BILL AND THE FOURTH AMENDMENT

(A paper prepared by the Washington Office of the American Civil Liberties Union, June 29, 1976)

#### I. INTRODUCTION

S. 3197, the administration's wiretap bill, establishes a procedure for judicial review via a warrant procedure for electronic surveillance of Americans engaged in "clandestine intelligence activities" and other threats to the national security. S. 3197 would add a new chapter to Title 18 of the United States Code which would follow immediately after the existing provisions pertaining to electronic surveillance enacted in 1968.

Both S. 3197 and the existing wiretap statute (18 U.S.C. 2510-2520) represent efforts by proponents of electronic surveillance to create a judicial warrant procedure which meets the requirements of the Fourth Amendment to the Constitution. The ACLU takes the position that neither the existing statute nor the administration's proposed amendments meet that test.

#### II. FOURTH AMENDMENT LIMITATIONS ON ELECTRONIC SURVEILLANCE

The Fourth Amendment reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

In layman's language the Fourth Amendment checks the authority of the executive branch to invade the privacy of its citizens by two basic techniques. First, it requires that wherever possible searches should be subject to review by judicial magistrate through a warrant procedure. The existing statute plus the administration's wiretap bill comply with that requirement. However, the Fourth Amendment also restricts both executive investigative officers and the

judges who review warrants by limiting searches to "particular" places and "particular" things to be seized. Ever since the statute was enacted in 1968, the ACLU has taken the position that the wiretap statute is an unconstitutional departure from this "particularity" requirement. The most recent proposal for national security electronic surveillance completely disregards the requirement that searches be limited to "particular" evidence of crime.

The 1968 wiretap legislation was enacted in response to two major Supreme Court decisions applying the Fourth Amendment to electronic surveillance, *Berger v. New York* 388 U.S. 41 (1967), and *Katz v. United States* 389 U.S. 347 (1967). In *Berger* the Supreme Court struck down a New York state wiretapping statute as violative of the Fourth Amendment. The court held for the first time that the Fourth Amendment applied not only to tangible things, but also to conversations and that the New York statute did not comply with the particularity requirement of the Fourth Amendment. A year later in *Katz* the Supreme Court reaffirmed the *Berger* decision and reversed a federal conviction based upon a wiretap because the federal officials failed to seek a warrant despite the fact that in the opinion of the court the officers had sufficient information prior to the tap to satisfy the particularity requirement of the Fourth Amendment.

One reason the federal officers in *Katz* did not seek a warrant is that at the time there was no statutory warrant procedure for electronic surveillance. Therefore Congress created such a procedure in 1968 in the Omnibus Crime Control and Safe Streets Act. That legislation was carefully drafted to meet the dictates of the *Berger* and *Katz* decisions. It requires law enforcement agents to present to federal judges specific facts which they believe establish probable cause that the potential target will engage in criminal activity and that there is probable cause to believe that evidence of a specific crime will be overheard in the proposed surveillance. Critics of the legislation, including the American Civil Liberties Union, insisted that despite that attempt at precision the bill could not comply with the Fourth Amendment's particularity requirement, especially as expressed in the *Berger* case. In traditional search situations the police must specify precisely what piece of evidence they intend to seize. Since the present statute does not require the police officer to specify precisely what the target would say which would be seized via the proposed electronic surveillance the statute is unconstitutional. Obviously, no electronic surveillance warrant procedure can be developed which will comply with the Fourth Amendment according to that standard.

### III. NATIONAL SECURITY ELECTRONIC SURVEILLANCE AND THE FOURTH AMENDMENT

In drafting the 1968 Act Congress not only skirted the particularity requirements of the Fourth Amendment, it also completely exempted from its coverage targets of so-called "national security" electronic surveillance. Such surveillance was to be conducted pursuant to the so-called "inherent authority" of the President to protect the United States from enemies, both foreign and domestic.

In 1972 the Supreme Court held that targets of such surveillance who were not agents of foreign powers, so-called internal security threats, in this case the Weatherman, were covered by the Fourth Amendment notwithstanding the so-called "inherent authority" exemption (18 U.S.C. 511(3)). *United States v. United States District Court*, 407 U.S. 297 (1972) (hereinafter the *Keith* case). The court held that such surveillance could only be conducted pursuant to a judicial warrant. Three years later the Court of Appeals for the District of Columbia extended the warrant requirement to threats against the national security which affected our foreign relations or who were agents of foreign powers, so-called "foreign intelligence" threats. *Zweibon v. Mitchell*, 516 F2d 594 (D.C. Circuit, 1975).

### IV. S. 3197 COMPLETELY DISREGARDS THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT

Faced with court decisions applying the Fourth Amendment to all national security electronic surveillance, whether the source of the threat is foreign or domestic; its national security electronic surveillance program in jeopardy; the Justice Department comes to the Congress with S. 3197, a proposal to create a warrant procedure as required by the *Keith* and *Zweibon* decisions. As it had done in 1967 when faced with the *Katz* decision, requiring a warrant procedure for all but national security electronic surveillance, the Department seeks to construct a warrant procedure which evades the particularity requirement of the Fourth Amendment. The sham warrant procedure which the Department



proposes in S. 3197 severely circumscribes the role of the judge and places an even milder burden upon law enforcement officials to specify the conversations they intend to seize than did the 1967 Act.

Under existing law, section 2518(3) of Chapter 119 specifies the findings by the court which are the necessary prerequisite to an order authorizing electronic surveillance for investigation of a criminal offense; section 2525(a) of proposed Chapter 120 is the corresponding section applicable to "national security" wiretaps. The critical difference between these two sections is the extent to which the court is empowered to go behind the assertions made in the application by the government agent. Under Chapter 119, the court is directed to actively engage in a thorough examination of the facts underlying the application to assure itself that a sufficient factual foundation is present justifying the interception. Under proposed Chapter 120, if the court finds that the target of the surveillance is a foreign agent as defined, then it is without power under this legislation to question any of the related facts "certified" by the Attorney General. Thus, under Chapter 119, the court is directed to review the substance of the application; under proposed Chapter 120, the court merely ensures that the procedural requirements have been met.

Under Chapter 119, the court must find probable cause to believe: (1) That a crime has been, is or is about to be committed by the particular individual whose communications will be intercepted; (2) that the facilities to be surveilled either belong to or are likely to be used by the target of the investigation; (3) that the conversations to be intercepted will pertain to the alleged offense; and (4) that other investigative procedures have been tried and failed. For each of the above findings, the court must independently assure itself that sufficient facts have been credibly alleged to justify a belief that the prerequisite has been met.

By comparison, under proposed Chapter 120 the court must only satisfy itself that the intended target of the surveillance is an agent of a foreign power and the facilities to be intercepted belong to or are likely to be used by such person. The court is without authority to question the government's assertion that information pertaining to foreign intelligence will be obtained by the surveillance. The government need only assert that "the purpose of the surveillance is to obtain such foreign intelligence information." (emphasis added) The court is equally without authority to enforce the requirement that other investigative techniques have been tried and proven unsuccessful. It must passively accept the government's certification that this is the case.

#### V. THE DISREGARD OF THE PARTICULARITY REQUIREMENT RENDERS S. 3197 UNCONSTITUTIONAL

The failure of the legislation to meet the "particularity" requirements of the Fourth Amendment, especially the use of vague undefined terms such as "clandestine intelligence" activities, and the limitations upon the judge's review of the circumstances justifying the warrant have been matters of considerable controversy in the Senate. In testimony before the Senate Intelligence Committee on the legislation prominent critics of the bill including Senator Mondale and Aryeh Neier, on behalf of the ACLU, described in detail the potentially abusive circumstances in which judges might have to automatically approve warrants under S. 3197. In subsequent questioning of Attorney General Levi, Chairman Inouye and others expressed concern about a variety of circumstances in which Americans might be engaged in non-criminal activity, including political activity protected by the First Amendment (lobbying members of Congress on behalf of a foreign power, e.g. American Zionist activities on behalf of Israel) which might justify electronic surveillance under the bill.

The Department of Justice has justified this drastic departure from Fourth Amendment requirements including surveillance of non-criminal political activities upon a series of Supreme Court cases pertaining to so-called "area searches."<sup>1</sup> The same year the Supreme Court struck down the New York wiretapping statute in *Berger* it also took a step in the wrong direction, in effect exempting from the Fourth Amendment so-called "area" searches *Camara v. Municipal Court* 387 U.S. 523 (1967). In that and a related case, *See v. Seattle* 387 U.S. 541 (1967), the Supreme Court sanctioned the use of so-called "area warrants" whereby municipal authorities might inspect a business or a dwelling for housing code violations, not upon probable cause that the dwelling was in violation of a particular housing code provision but upon general experience that dwellings in a particular area are likely to be in violation of the code.

<sup>1</sup> Compare S. 3197 with the New York statute which the court struck down in *Berger* (see appendix A).

The *Camara* and *See* precedents have been relied upon in subsequent cases, *Almeida-Sanchez v. United States* 413 U.S. 266 (1973) and *United States v. Amado Martinez-Fuerte* 44 U.S.L.W. 5336 (1976) to sanction so-called border searches of automobiles not upon probable cause that the car actually contains a named illegal alien but upon the experience of the immigration officer that if cars are checked at a particular point near the border a certain percentage will contain illegal aliens.

All four cases are frequently cited for the proposition that the Supreme Court has extended the warrant requirement of the Fourth Amendment to "area" searches and border searches. The Justice Department relies upon these cases for the proposition that when the Supreme Court says that the warrant requirement of the Fourth Amendment applies to a certain class of searches, it does not necessarily mean that the particularity requirement of the Fourth Amendment must be a part of the warrant requirement. Therefore Attorney General Levi is fond of citing the following language in the *Keith* case:

"Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection." 407 U.S. 297, 322

He interprets that language and the Supreme Court's prior decisions on "area" searches and border searches as meaning that the warrant procedure in S. 3197 need not require probable cause to believe that electronic surveillance will overhear criminal conversations.

The "area" search and border search cases are a weak reed upon which to rely such a dangerous relaxation of Fourth Amendment standards. First, none of these cases actually represents a deliberate search for information unrelated to criminal law. S. 3197 is intended to permit electronic surveillance of activities, "clandestine intelligence activities," which the Justice Department candidly admits is non-criminal. The area search and border search cases were searches for evidence of illegal activities (housing code violations and immigration law violations). These cases simply drastically reduce the quantum of evidence of possible criminal activity necessary to justify a search but, the Attorney General to the contrary notwithstanding, they do not eliminate the requirement altogether.

Second, none of these cases deals with potentially sensitive political activities protected by the First Amendment. The border search and "area" search cases pertain to traditional criminal activities. Although these sweeping searches will invade privacy they will chill or deter nothing more than criminal activity. Electronic surveillance of non-criminal "clandestine intelligence activities" (especially political activities such as lobbying) will certainly chill First Amendment protected activity.

Third, "area" and border searches are much less intrusive than 90 days of electronic surveillance. An "area" search for housing code violations is usually a walk-through of a dwelling or commercial establishment. A border search is nothing more than a momentary automobile search. Electronic surveillance, especially via so-called "bugs" is perhaps the most intrusive form of search, the most complete invasion of privacy in the wit of man (indeed the bill permits video as well as aural electronic surveillance). Furthermore, S. 3197 permits a continuing invasion of privacy for 90 days with unlimited additional 90 day extensions.

#### VI. CONCLUSION: THE ACLU POSITION

In conclusion the ACLU is greatly disturbed by the dramatic relaxation of Fourth Amendment law contemplated by S. 3197. It is ironic that the new chapter 120 proposed in this legislation would in effect provide less Fourth Amendment protection to Americans engaged in non-criminal "clandestine intelligence activities" such as lobbying Congress for more arms for Israel at the behest of the Israeli government, than it does the KGB agent engaged in criminal espionage who would be entitled to the protections of existing law. The so-called "area" search and border search cases do not justify such a relaxation of Fourth Amendment standards. Therefore at a minimum the ACLU recommends that the bill be amended to eliminate electronic surveillance of American citizens and resident aliens under the new chapter and limit all such electronic surveillance to existing law. While the ACLU is certainly not satisfied with that statute, it would certainly prefer relaxation of the particularity requirement for non-resident aliens to S. 3197 as presently drafted. Ideally, the old national security exemption 18 U.S.C. 2511(3) should be repealed and all national electronic surveillance con-

ducted pursuant to the existing law; or better yet all electronic surveillance authority repealed because in our view no such statute can comply with the *Berger* case.

## APPENDIX A

## NEW YORK STATUTE STRUCK DOWN BY SUPREME COURT IN 1967

1. "§ 813-a. *Ex parte* order for eavesdropping

"An *ex parte* order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L 1958, c 676, eff July 1, 1958."

MEMORANDUM FROM HOPE EASTMAN, ASSOCIATE DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION, JUNE 4, 1976, ON S. 3197, NATIONAL SECURITY WIRETAPPING

Serious problems exist with S. 3197 which we believe must be faced before the Senate Judiciary Committee votes on this bill. We, therefore, urge you to delay action on the bill and hold further hearings before any action is taken on it.

The enclosed material highlights some of these as-yet-unanswered questions and problems. The material includes:

"(a) A memorandum pointing out that § 2528 of this legislation will leave room for Presidential assertions of inherent power to engage in burglaries and break-ins in the name of "national security";

"(b) A memorandum prepared by Robert Borosage of the Center for National Security Studies and an article by Christopher Pyle in *The Nation*, May 29, 1976, both of which identify a wide range of other problems with the bill; and

"(c) A chart taken from reports of the Administrative Office of the United States Courts, showing that of the 4863 Title III (i.e. for criminal investigations) wiretaps sought over a six-year period, only 13 were turned down by judges. Judges are even less likely to refuse "national security" warrants under S. 3197. If this is so, the major gain cited by the bill's proponents as reason to overlook or acquiesce in its many undesirable aspects is illusory."

The ACLU is opposed to all wiretapping. We are opposed to Congress legislating a whole new justification for it. Even if you do not share this view, there are many other things wrong with this bill which warrant your opposition to it.

MEMORANDUM FROM HOPE EASTMAN, ASSOCIATE DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION, JUNE 4, 1976, EFFECT OF S. 3197 ON "BLACK BAG" JOBS

The Court of Appeals for the District of Columbia has just decided a group of cases—*United States v. Ehrlichman*, No. 74-1882, *United States v. Barker*, No. 74-1883, and *United States v. Martinez*, No. 74-1884 (D.C. Cir. May 17, 1976)—which suggest that further revision is needed in Section 2528 of S. 3197. As

written, it would serve as the basis of Presidential assertions of a power to authorize burglaries and break-ins for "national security" purposes.

The current draft of S. 3197 contains language which is designed to narrow the Section 2511(3) language now in Title III. It provides in part:

"Nothing contained in . . . this chapter shall be deemed to affect the exercise of any constitutional power the President may have to acquire foreign intelligence information if (a) such acquisition does not come within the definition of electronic surveillance in paragraph (2) of subsection (b) . . ."

While aimed by its proponents at NSA, this broad language leaves intact Presidential assertions of power to collect foreign intelligence information by all and any means not covered by the statute.

This is not a theoretical issue of interest only to scholars and purists. Although the conviction of John Ehrlichman for his role in the break-in into the office of Lewis Fielding, Daniel Ellsberg's psychiatrist, was upheld, the Court of Appeals, taking its lead from *United States v. United States District Court*, 407 U.S. 297 (1972); and *Zweibon v. Mitchell*, 516 F2d 594 (1975), cert. denied 44 U.S.L.W. 3587 (April 20, 1976), held only that if there was such a "national security" exemption, it had to be asserted by the President or the Attorney General.

However, more significantly, the Court of Appeals reversed the convictions of Barker and Martinez. It ruled that they had relied in good faith on Howard Hunt's apparent authority, given their long involvement with him in past CIA activities, and that the existence of a long-standing government assertion of national security exception to the warrant requirement provided them with a "plausible legal theory" to support their belief that Hunt could have that authority. Whatever one thinks about the ultimate fairness of freeing Barker and Martinez, the fact remains that the court relied on this assertion of inherent power to do so.

Thus, unless Congress closes the "national security" exception to the warrant requirement, the "national security" argument will be available not only for wiretapping but for break-ins and burglaries. It should be kept clearly in mind that the break-in involved in these cases was of Dr. Fielding, who himself had no foreign intelligence connection. Indeed, even the foreign intelligence links to Daniel Ellsberg himself were tenuous at best. It should also be kept firmly in mind that in this case, the Department of Justice for the first time in history officially took the position that:

"It is and has long been the Department's view that warrantless searches involving physical entries into private premises are justified under the proper circumstances when related to foreign espionage or intelligence." Memorandum for the United States *Amicus Curiae* (May 30, 1975); cited in *United States v. Ehrlichman*, *supra*, opinion of Judge Leventhal, slip op. at 4.

Without this inherent authority, these activities would be illegal under state and federal law. The Senate Select Committee urged the Congress to "make clear to the Executive Branch that it will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution . . . or any other statutes." Final Report, Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, Book II, S. Rep. No. 94-755, 94th Cong., 2nd Sess. 297 (1976).

That task is now before the Judiciary Committee as it considers this bill.

MEMORANDUM TO HOPE EASTMAN, ASSOCIATE DIRECTOR, WASHINGTON OFFICE, ACLU, FROM ROBERT BOROSAGE, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, JUNE 4, 1976

In response to your request, the following is an analysis of S. 3197, the "national security" wiretap bill now before the Senate Judiciary Committee. It describes the serious flaws in the bill in its present form. New hearings should be scheduled to review the revised version of the legislation and to evaluate it in light of the recommendations of the Senate Select Committee on Intelligence (the Church Committee). This memorandum describes the primary reasons the current bill is unacceptable.

The principal purpose of the bill is to authorize warrants for electronic surveillance to obtain foreign intelligence information, even where there is no evidence of unlawful activity. The bill thus empowers the government to conduct wiretaps against American citizens engaged in purely lawful activity. Under S. 3197 a warrant can be issued upon a showing of probable cause to believe that the citizen is conspiring with or aiding an agent of a foreign power, faction or party, engaged in something called "clandestine intelligence activities," or "terrorist

activities." Neither term is defined in the legislation. Attorney General Levi has offered no definition of "terrorist activities," and states that "clandestine intelligence activities" includes lawful behavior, such as collection of information about industrial affairs or protests directed against foreign installations in the United States. A future Attorney General could define or redefine these terms in even looser ways.

This provision is simply unacceptable. In the past, warrantless "national security" wiretaps have been repeatedly misused for political surveillance. The Church Committee reviewed the problem carefully and concluded that the only protection against abuses was that *no* American citizen should be subjected to any wiretapping other than upon a showing of probable cause to believe that the information to be intercepted relates to criminal activity (Title III, 18 U.S.C. 2510-2520). The Church Committee considered and rejected the Administration's assertion that some lawful conduct should be the basis for surveillance. The Committee concluded that if the laws were insufficient to protect valuable national security information from foreign agents, then the laws should be amended, rather than create a new "dangerous basis for intrusive surveillance." (Church Report Volume II, p. 325). S. 3197 ignores this recommendation without explanation.

The difference is crucial. Electronic surveillance is a "search and seizure" under the Fourth Amendment. Many constitutional scholars believe that wiretaps constitute a "general search" incompatible with the provisions of the Fourth Amendment. To allow this intrusive surveillance technique to be used outside of a criminal nexus sanctions a serious encroachment on political liberty.

A criminal nexus limits somewhat the type of information which is of relevance (evidence of crime), as well as the targets and the activities which are of concern. A citizen can with some confidence preserve his or her privacy by limiting his or her behavior to non-criminal activity. Thus probable cause of criminal activity at least provides a minimum limiting conceptual framework for warranting surveillance of American citizens.

The provisions of S. 3197 abandon that framework. Under the legislation, a warrant can be issued for electronic surveillance against virtually anyone of serious political concern to an administration in office. The government need only show *evidence* of (1) a connection with someone who may be (2) an agent (3) engaged in secret intelligence activities. It need not prove any of the three to gain the warrant, only provide evidence of them. For example, in 1963, Attorney General Kennedy first approved a wiretap upon a close aide of Dr. Martin Luther King, Jr., whom the FBI alleged was attempting to influence Dr. King on behalf of the Soviet Union, and later sanctioned a wiretap upon Dr. King because of "possible communist influence in the racial situation." A similar showing might well suffice to meet the standards of S. 3197. The wiretap would theoretically be limited to the collection of foreign intelligence information, but that is defined so broadly as to nullify any minimization procedures.

Moreover, the standard in S. 3197 provides no guide for an active citizen who hopes to avoid surveillance. Any scholar, activist, businessman, member of Congress or foundation executive concerned with questions of national security affairs is a possible target under the act. To avoid coming under suspicion, a vocal critic of the government would have to sever all relations with foreign citizens of those in contact with them.

The legislation would seem to permit an Attorney General less sensitive to civil liberties than Edward Levi to define "clandestine intelligence activities" to warrant electronic surveillance similar to the so-called "Kissinger seventeen taps" on journalists and government employees. Electronic surveillance similar to the "sugar lobby" taps of a Congressman and his aides in the early 1960's (placed upon an allegation that a foreign country was attempting to influence Congressional deliberations about sugar quota legislation) would certainly be possible. Congressmen who travel abroad, entertain lobbyists for, say, greater aid to Israel or lower trade restrictions for Yugoslavia; or receive honoraria to speak to foreign lobby groups would all be potential targets, as would any opponents of administration policy with contacts abroad.

Supporters of the bill argue that its scope is limited by the judicial screen provided by a warrant process. The history of the wiretap legislation belies that claim. From 1969 to 1975, only 13 of 4,863 applications for warrants under Title III were denied. Judges tend to defer to prosecutors. In the area of national security, this deference will surely increase. Moreover, S. 3197 goes to extraordinary lengths to insure that a warrant will not be denied. Warrant applications

will be reviewed by one of seven district court judges selected by the Chief Justice. If one of these should be so bold as to deny an application, the legislation provides for an extraordinary *ex parte* appeal to a specially-designated three judge appellate panel; if necessary, a further *ex parte* appeal may be made to the Supreme Court. In reality, few if any applications will ever be denied.

Thus the only protection the warrant procedure provides is the paper record it creates for review. Even this protection is vitiated in S. 3197. Generally foreign intelligence (and political intelligence) wiretaps are for the purpose of gathering information rather than prosecution. Thus the paper record is seldom exposed to later judicial review. Moreover, if evidence "incidentally acquired" from the tap is introduced in trial, the legislation provides for an *ex parte*, *in camera* submission to the judge. Neither the defendant nor his or her attorney can review the submission. The court is thus deprived of an adversary proceeding on the validity of the original order, virtually the only basis for adequate review of an order.

S. 3197 does require that the Attorney General approve the application and that a Presidentially-designated national security official certify that the information sought is foreign intelligence information not otherwise available. Formal approval and certification offer some protections. Yet, in the past, the judgments of such officials have been suspect. Attorney General Robert Kennedy approved the wiretap on Martin Luther King and his associate. The seventeen taps against reporters and government officials were approved by Kissinger and Attorney General Mitchell. As the Church Committee concluded, the only adequate protection is a conceptual framework which limits the discretion of both officials and judges; a criminal nexus provides that framework.

Insistence upon a criminal nexus is particularly important in this legislation, for it is but the first of a series. The past programs of illegal mail opening and break-ins (surreptitious entry) were justified on the basis of national security. This bill does not preclude that assertion in the future. This legislation will also tend to foreclose the necessary debate about the scope of the FBI's new charter. Surely if Bureau has the power to wiretap citizens without evidence of crime, it has the power to engage in investigations not related to crime, the very power which it claimed for political surveillance and disruption in the past.

Other provisions of S. 3197 raise questions worthy of review. The legislation does not provide for notice to American citizens targeted or overheard after the tap is removed. As noted above, it also empowers the government to use the information in criminal or other judicial proceedings without an adversary proceeding on the legality of the tap (Section 2526 C). Together these two deviations from Title III proceedings will make warrants under this chapter much more attractive to federal officials than those under Title III.

S. 3197 also contains a disclaimer section on Presidential Power (Section 2528). Improved over an earlier version, the section now seeks to exclude NSA's surveillance from the provisions of the bill and to empower the President to act without a warrant in an emergency. The former is acceptable as long as the language is revised to make it clear that it refers only to NSA and does not preserve an inherent Presidential power to use other surveillance techniques on national security grounds. The Congress must also not ignore the need to bring NSA under the limits of the Constitution in the near future. The Church Committee offered a comprehensive set of recommendations on NSA, which is apparently acceptable to the agency, and which should be enacted immediately.

The Presidential emergency clause requires changes also. As it now reads, the section is a disclaimer, stating that the Congress has no intention to limit the President's inherent power to wiretap under circumstances "so unprecedented and potentially harmful," as not reasonably within the contemplation of Congress. Thus the section still assumes the President has residual constitutional powers to wiretap.

The provision should be altered to constitute a grant of power, empowering the President to wiretap without a warrant in extraordinary emergency situations. The bill and/or the legislation history should then make clear that this provision applies only in unique instances, so threatening to the existence of the country that extraordinary measures are necessary. It should be specified that the provision cannot authorize an on-going program of taps, or a long-term wiretap. It also should be coupled with a requirement to report to Congress.

Under pressure from the sponsors of the bill, the members of the Judiciary Committee are now feeling great pressure to report out this legislation. There is no need for haste, however. At the very least, the Judiciary Committee should be required to hold a series of hearings which will explore the differences between S. 3197 and the recommendations of the Church Committee.

## TITLE III; 18 U.S.C. 2510-20

## INTERCEPT ORDERS

	Applications		Denials		Total applications
	Federal	State	Federal	State	
1969.....	33	269	1	1	302
1970.....	183	414	0	0	597
1971.....	285	531	0	0	816
1972.....	206	649	0	4	855
1973.....	130	734	0	2	864
1974.....	121	607	0	2	728
1975.....	108	593	0	3	701
Total.....	1,066	3,797	1	12	4,863

Source: "Annual Reports on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications"; for the period of January 1969 to December 1975. Administrative Office of the U.S. Courts, Washington, D.C.

[From The Nation, May 29, 1976]

## A BILL TO BUG ALIENS

(By Christopher H. Pyle<sup>1</sup>)

At a White House meeting on March 23, President Ford, Attorney General Levi and Senator Kennedy unveiled a bipartisan bill (S. 3197) to govern electronic surveillance for national security purposes. To the White House press corps, more interested in politics than substance, the proposal seemed splendid—the historic first fruit of a year of wrenching disclosures and fractious debate over the proper role of intelligence agencies in a free society. If passed, the bill would require the government to obtain judicial warrants before installing wiretaps and bugs to monitor suspected foreign agents.

Unfortunately, the Levi-Kennedy bill is not splendid at all. It is regressive legislation which comes perilously close to perpetrating a fraud upon the Constitution, the courts and the public. To understand why, it is helpful to recall some basic principles, including the Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

According to the Supreme Court, electronic surveillance constitutes a "search" within the meaning of the Amendment and interception of electronic communications is a "seizure." As a general rule, warrants to conduct such searches can be issued only by judges, who must decide whether the proposed invasion of privacy is "reasonable." Traditionally, this has meant that the government must persuade the judge that there is probable cause to believe that the information sought relates to a *crime*; warrants for the clandestine collection of general information for political purposes have never, until now, been sought or granted.

To carry out their constitutional function of providing a potential check against overreaching investigators, judges are expected to render an independent and informed judgment based on the totality of the circumstances. They must be told why the government believes that a crime has been, or is about to be, committed; why the proposed search may produce evidence of that crime; where the government proposes to search, and what it expects to seize. Unless the judge knows these facts, and can examine the inferences which the investigators have drawn from them, he cannot carry out his duty.

In their attempt to clarify and expand the government's authority to gather intelligence, the bill's sponsors would undermine these principles in three fundamental ways. First, they would create a new breed of "funny warrants" in which the need for the monitoring would be decided by the government's spy chiefs, and not by federal judges. Second, the bill would deny Fourth Amendment rights to foreign visitors, even though they have done nothing to violate our laws or threaten our security. And third, it would expose citizens, resident aliens and

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foreign visitors alike to the possibility of criminal prosecution or political harassment as the result of searches undertaken without the slightest reason to believe that a crime has been, or is about to be, committed.

Perhaps the most shocking aspect of the bill is its corruption of Fourth Amendment standards. On its face, S. 3197 appears to require a judicial finding of "probable cause," but upon closer reading it makes a mockery of that duty. No crime need be alleged; the surveillance would be for intelligence purposes only. Courts would be permitted to decide whether there is probable cause to believe that the target of the proposed surveillance is a foreign agent or foreign power, and that the facilities or place to be monitored are, or are about to be, used by a foreign power. But, the crucial decision of whether the interception was really needed for legitimate intelligence or counterintelligence purposes would be left to the President's Assistant for National Security Affairs or other national security executives like the Secretary of Defense, the Secretary of State, the Director of Central Intelligence or the Attorney General.

Under a novel certification procedure, the nation's spy chiefs (or their designees) would simply declare that the proposed tap or bug was needed—to protect the country against attack, assure the security or defense of the nation, promote the conduct of foreign affairs, or counter the intelligence activities of foreign nations. Judges would not be allowed to question that judgment. In short, the bill would create a "funny warrant" delegating an essential element of the judiciary's power to the unreviewable discretion of the men who have succeeded John Mitchell, Richard Kleindienst and Richard Helms. Judges would be reduced to bestowing empty blessings on the unchecked exercise of Executive will.

In addition, the bill appears to be grounded on the extraordinary idea that non-resident aliens are not "people" within the meaning of the Fourth Amendment. Reviving a theory used by Attorney General Palmer to justify his infamous "Red Raids" of 1919 and 1920, Attorney General Levi told Senator Church's Select Committee on Intelligence Activities last December that the only "people" protected by the Constitution from unreasonable searches and seizures are: "We, the people" who, in the words of the Preamble, "do ordain and establish this Constitution for the United States of America."

These people, Levi insisted, included only citizens and resident aliens. How resident aliens, who cannot vote, can be regarded as "ordainers" under the Preamble and therefore "people" under the Fourth Amendment, he did not say. Nor did the Attorney General explain why foreign visitors are now considered "persons" entitled to due process and equal protection under the Fifth and Fourteenth Amendments, if they are not also "people" entitled to be free from unreasonable searches and seizures under the Fourth. Ignoring these obvious anomalies, Levi has revived a nativist view of the Constitution which, if accepted by the Supreme Court, would transform hundreds of thousands of foreign visitors each year into Fourth Amendment outlaws, subject to whatever invasions of their privacy might be deemed appropriate by transient, often anti-foreign majorities of Congress.

This crabbied view of the Fourth Amendment can be found in the wiretap bill's sweeping definition of an "agent of a foreign power" as anyone "who is not a permanent resident alien or citizen of the United States and who is an . . . employee of a foreign power." A "foreign power" is defined not only as "foreign governments" and "military forces" but "factions, parties, . . . or agencies or instrumentalities of such entities, or organizations composed of such entities . . . or foreign-based terrorist groups."

The scope of this definition is truly breathtaking. Fourth Amendment protection against unreasonable national security wiretapping would be denied not only to suspected spies (whose agencies curiously are omitted from the list) but to doctors from Sweden, professors from France, railroad engineers from Great Britain, politicians from Canada, and UNICEF workers from Australia. Indeed, given the millions of people that socialism has put on foreign government payrolls, about the only foreign visitors clearly exempted under the bill are apolitical foreign businessmen, like the executives of multinational corporations whose dealings in strategic commodities have caused consternation in our intelligence agencies.

Were surveillance under the bill limited to cases of espionage or sabotage, the sweep of the foreign agent definition would be of little consequence. The bill, however, has nothing to do with those crimes, which can be investigated under the 1968 wiretap act. What Levi wants is authority to use wiretaps and bugs to investigate wholly lawful statements and activities. The primary purpose of his bill is not even to counter the lawful snooping of Russian spies (although it would also serve that purpose). It is to facilitate spying by the FBI and the CIA on the



communications of foreign visitors in search of information on the politics and economics of foreign lands, regardless of whether those lands are hostile to the United States. Targets could include one's cousin from Brussels who imports oil for the city, a brother-in-law from Israel who sits in the legislature, or an uncle from Dublin who raises money in Ireland for the IRA. Moreover, since the bill empowers courts to issue warrants *compelling* landlords, custodians, or "other specified persons" to assist with the surveillance, Americans could be forced to help the government spy on their own guests from abroad.

If the Levi-Palmer theory of the Fourth Amendment were upheld by the Supreme Court in a test of this bill, the FBI would have constitutional grounds for asserting that foreign visitors have no rights its agents are bound to respect. Visiting the United States could become as annoying as touring Communist countries, where clandestine searches of hotel rooms and luggage are a common occurrence.

The theory is too preposterous to be maintained. Should the bill ever be challenged in court, the Justice Department is likely to take a seemingly more moderate position, to concede Fourth Amendment rights to foreigners in theory and eviscerate those rights by definition. For example, it could insist that the warrant procedures of S. 3197 are "reasonable" when applied to foreigners, even though they would be unconstitutional if applied to citizens, because foreigners are more likely than citizens to engage in espionage, and because espionage might, in certain circumstances, pose greater danger to the public interest than the ordinary felonies of patriots.

Given the reluctance of the Supreme Court to come out and say clearly that the Fourth Amendment applies to government taps and bugs, whatever their purpose, the ploy might work, even though the bill has nothing to do with the traditional crimes of espionage or sabotage. Federal government officials are disposed to grant aliens the same rights as citizens, and the Justices of the Supreme Court are no exception. For years they have upheld the constitutionality of legislation denying aliens the rights to free speech, free association and fair hearings enjoyed by citizens.

Aliens charged with espionage have fared no better with Fourth Amendment claims. Warrantless wiretaps were upheld in the case of Igor Ivanov, a Soviet national convicted in 1970 of spying on the Strategic Air Command. The Third Circuit Court of Appeals ruled that "in the circumstances of this case prior judicial authorization was not required," and held that Ivanov's Fourth Amendment rights were adequately protected by an after-the-fact review of the "reasonableness" of the wiretapping by a trial court that knew of the evidence that had been obtained. The Court of Appeals acknowledged that its decision amounted to a "relaxation of Fourth Amendment requirements" and that similar wiretaps in the case of a domestic political organization or ordinary criminal would have been illegal, but the Supreme Court refused review.

In 1960, the Warren Court went even further in order to uphold the abduction of Rudolph Abel, the Soviet master spy, who was spirited out of his studio in Brooklyn, New York, and flown to Brownsville, Texas, where he was held prisoner for two weeks by the CIA. The law which permitted Abel's arrest under an administrative warrant issued by the Immigration Service (because he was suspected of entering the country illegally) was accepted as constitutional, even though the arrest of a citizen under similar circumstances and without prior judicial authorization would not then have been tolerated.

Thus, while it remains to be seen whether the Supreme Court will extend its current double standard from cases involving spies and immigrants to a broad law permitting political and economic eavesdropping on law-abiding foreign visitors, the prospects are not auspicious.

The Levi-Kennedy bill threatens more than the rights of visitors; it would limit the rights of citizens as well. The Supreme Court has ruled, as a matter of Fourth Amendment law, that evidence obtained from warrantless government taps and bugs must be excluded from judicial proceedings; nothing less will cure the constitutional violation. The proposed law would deny this protection to citizens as well as aliens, provided that the executive branch had been able to persuade a judge that there was probable cause to believe that the person to be monitored was engaged in "clandestine intelligence activities . . . pursuant to the direction of a foreign power." Once the judge accepts a "funny warrant," authenticates the certificate of need, and accepts the government's promises to minimize its eavesdropping on innocent third parties, all evidence of any criminal activity "incidentally" overheard can be used against the target in court. Moreover, the government would not have to reveal to the defendant where it got the information, as it now must do in ordinary criminal cases.



Renault, Sacramento Bee

On its face, this provision appears to be aimed at an especially dangerous class of criminals: atom spies, saboteurs and skyjackers. In fact, that is not its purpose; federal law already permits the government to monitor them. This bill calls for something new. By using the term "clandestine intelligence activities" instead of espionage, sabotage or murder, the government seeks the power to use wiretaps and bugs to investigate wholly noncriminal conduct including lawful inquiries into public record information bearing on American economic and military capabilities.

The provision is a memorial to a Nazi agent named Heine who put together an extensive profile on our aircraft industry on the eve of World War II by posing as a student/journalist and using wholly nonclassified data. Under the espionage laws then and now in force he could not be convicted of any crime.

The law Attorney General Levi proposes would permit electronic surveillance of Mr. Heine without probable cause to believe that he was about to commit any crime. It would also go much further, because nothing in it says that the person acting "pursuant to the direction of a foreign power" must be a witting participant in "clandestine intelligence activities." All the government would need to show would be that there was probable cause to believe that an unquestionably loyal American was engaged in research, advertising, lobbying or legal work for a foreign government, party, faction (whatever that is), or international organization, and that the work being done arguably served the secret intelligence purposes of that "foreign power." And, since judges would not be permitted to question the government's certificate of need or review the information gleaned from the wiretap, they would be unable to protect American citizens from the misuse of national security wiretapping for partisan political purposes.

Similarly, the bill would permit electronic surveillance of any person—including an American with no links whatever to a foreign power—who "assists . . . a person who, pursuant to the direction of a foreign power, is engaged in clan-

destine intelligence activities, sabotage, or terrorist activities. . . ." Again, witting service is not required. Lawful assistance to a person secretly engaged in wholly lawful information-gathering activities for a foreign government would expose one to wiretapping or bugging and the concomitant danger of criminal prosecution for wholly unrelated activities which might, for one reason or another, be considered criminal. Given the specious justifications still being offered by Nixon administration officials for their taps on newsmen and ex-National Security Council aides, and the harassing use of criminal and noncriminal wiretap information by the FBI in its vendetta against Martin Luther King, it is not difficult to see how this provision could be misused.

Finally, the same provision would endanger the privacy of anyone who, wittingly or unwittingly, "assists" any person engaged in undefined "terrorist activities" anywhere on the globe "pursuant to the direction of a foreign power." Ethnic Americans with ties to strife-torn countries would be particularly vulnerable, because the bill is written broadly enough to permit monitoring of money raisers for Palestinian charities, persons who support relatives on the revolutionary side of a foreign war, or publishers who print the manifestoes of foreign revolutionaries.

The bill's ultimate mockery of the Constitution and the courts, however, lies not in its subversion of the Fourth Amendment but in its failure to reject executive claims to an inherent constitutional power to conduct surveillances, whatever Congress provides by law.

The bill seems to require that intelligence agencies obtain judicial warrants before undertaking any wiretaps or bugs, but that is not the case. A disclaimer at the end of the bill releases the executive branch from even that small restraint. It would put the Congress on record as actually acknowledging "the constitutional power of the President to order electronic surveillance . . . [for national security intelligence purposes]" and disclaiming any intent to restrict that power.

No Congress has ever gone so far. The disclaimer is not merely a disclaimer; it would actually give the executive branch the power, subject only to whatever restraints the Supreme Court might impose, to evade the bill from the outset, or to defy a federal judge and go ahead with a surveillance he has refused to approve.

It is probable that the bill's sponsors on Capitol Hill do not intend the many abuses that could arise from it, but laws touching on fundamental rights should be drafted with precision and should not lend themselves to easy manipulation. It is not enough to say that we now have an Attorney General of unquestionable integrity, or that the intelligence bureaucracy has learned its lesson. If the history of electronic surveillance over the past forty years teaches us anything, it is that officials of high integrity have adopted specious interpretations of the law, and that secret agencies should never be trusted.

Liberal proponents of the bill argue that it deserves support despite its obvious constitutional defects because it contains useful procedures to protect the privacy of third persons, and because the current Supreme Court, if left to its own devices, might rule that judicial warrants are not required when the target of the eavesdropping is a suspected foreign agent. In today's climate, they argue reformers must take what they can get. The important goal should be to establish the principle of judicial warrants—even "funny warrants"—in national security cases, vindication of the rest of the Fourth Amendment can come in later years. The bill may demean the courts and defraud the public, but that is the price which must be paid for a marginal advance for liberty in an atmosphere hostile to reform of the intelligence agencies.

If they are right, that is a tragic commentary on the state of liberty on the eve of our Bicentennial.

[From *The Nation*, May 29, 1976]

## BURMA: THE LONG SLEEP

(By David J. Finkelstein <sup>1</sup>)

My first visit to Burma, in 1964, consisted of the maximum allowable twenty-four-hour stopover in Rangoon. At that time an increasingly anti-foreign government under Ne Win's despotic grip was in the process of "Burmanizing" the country by expropriating businesses owned primarily by Indian, Pakistani and Chinese residents. After being stripped of all their possessions, including their wedding rings, those fortunate enough to have foreign passports were thrown out

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of the country. Those born in Burma, who had no such passports, could do nothing but remain, ostensibly with no means of livelihood. I stayed the night at the vacant, gloomy and fast deteriorating Strand Hotel (where in the "old days" a string ensemble used to serenade dinner guests), disappointed at not being able to follow Bob Hope and Dorothy Lamour up the fabled *Road to Mandalay*, and listened as a lonely old Anglo-Burman clerk lamented that the "Burmese road to socialism" was a path to isolation and stagnation. And, indeed, so it seems to have been.

The Burmese Government points with pride to the fact that, unlike Indochina, Burma has avoided the ugly aspects of foreign intervention. But in doing so, it seems to have brought itself to the brink of economic disaster. In desperate need of foreign currency, the government has relaxed its visa restrictions to the extent that foreigners are now allowed a maximum of one week's stay in Burma. There are thus a few more guests at the Strand these days, including several Texas oil tycoons, complete with paunches, cigars and ten-gallon hats. Along with less visible Japanese oilmen, they are involved in offshore prospecting. (Burma, the largest country in Southeast Asia after Indonesia, is just about the size of Texas.) The hotel is now so run-down that rats compete with guests, at least in the dining room, but since Burma stands out as one of the most remarkable countries in Asia—warm and humorous people, exquisite craftsmanship, fascinating manifestations of Buddhism, archaeological treasures to match the now inaccessible Angkor Wat, etc.—the traveler willing to overlook this and other inconveniences is more than rewarded for his pains.

During my recent one-week stay, I was able to meet with some Burmese officials, including several from the Ministry of Planning and Finance—a curious agency from a country so seemingly devoid of planning and financing. To avoid having to file the detailed reports required by a stifling bureaucracy, Burmese officials prefer not to talk with foreigners, even foreign embassy personnel, in their government offices, and they are understandably guarded in their conversations even when meeting on the outside. By and large, however, the Burmese seem to be quite candid and critical in private conversations with strangers, and those of Chinese ancestry are particularly forthcoming when conversations can be carried on in Chinese. Not that the government tolerates criticism and dissent. Recently, for example, a labor leader complained that his workers could not live on 3 cents a day, and for this he was immediately sentenced to six years in prison. But the Burmese dictatorship is so hopelessly incompetent that even in repression it is to some extent inept.

The black market operates efficiently in Burma; everything else appears stagnant. Rangoon, the drab capital with a population of 2 million, is illustrative. Its almost deserted "international" airport is as dilapidated as Boston's South Station—evidence perhaps that the gap between capitalism and socialism is indeed narrowing. The Union of Burma Airways owns a few ramshackle buses which, though they sometimes transport passengers from Rangoon to the airport, don't seem to have a mandate to work the other way around. So a traveler must take his pick of "taxis"—World War II vintage jeeps, each accompanied by three hustlers, an example, no doubt, of underemployment in a country where dentists work as typists and chemists as clerks. The youngest of the three hustlers, aged about 10, cranks the jeep to start it, since batteries are impossible to come by unless one has access to smugglers or to the military. The other two, after helping the passenger into the cramped vehicle, climb aboard themselves. One serves as driver, the other as chief engineer, for the fifteen-minute ride on virtually trafficless streets to the refuse-littered center of town is interrupted by several breakdowns requiring on-the-spot repairs. The ride costs about 25 *kyat*, the equivalent of \$4 at the official rate or \$1 on the black market.

STATEMENT OF CHARLES SCHEINER, CO-CHAIRPERSON, WESTCHESTER PEOPLE'S ACTION COALITION, JUNE 26, 1976

My name is Charles Scheiner and I am submitting this statement on behalf of the Westchester People's Action Coalition Inc. (WESPAC, of which I am Co-chairperson), the New York Coalition to Defeat Senate Bill One, and the Westchester Coalition to Defeat S. 1. WESPAC is a broad-based political action coalition, consisting of a number of organizations and over a thousand individuals in Westchester County, N.Y. It is located at 100 Mamaroneck Avenue, White Plains, New York 10601. The New York and Westchester Coalitions to Defeat S. 1 were formed in 1975 in order to begin to provide grass-roots opposition to the passage of this repressive proposed criminal code. I am an active member of the New York Coalition and Coordinator of the Westchester Coalition.

As S. 1 has been temporarily stalled, we have come to realize that many of its provisions are being enacted in other ways. Numerous executive orders, Supreme Court decisions, and other pieces of legislation are making the substance of S. 1 into the law of the land. Although S. 3197 is not identical with the sections of S. 1 dealing with surveillance (Subchapter 31A), it contains a number of the same provisions, particularly in its recognition and perpetuation of the concepts embodied in Title III of the Crime Control and Safe Streets Act of 1968, which legitimized government wiretapping, including warrantless wiretapping in "emergency" situations. We are therefore concerned with S. 3197; a number of the specific objections will be made clear below.

Although I am not an attorney, I have spent most of the past year researching the various facets of S. 1, particularly where it conflicts with our Constitutional rights. A good deal of this effort has been spent studying the history, present status, and proposed future federal statutes and judicial decisions regarding wiretapping and other forms of electronic surveillance. I have also done a significant amount of public speaking on the dangers posed by pending legislation (particularly S. 1), having talked with over 25 groups in the past four months. In most of these discussions, the issue of wiretapping emerged as one which concerns a great number of people. Therefore I feel qualified (probably more qualified than someone who sits in a law office day in and day out) to offer this statement on the Foreign Intelligence Surveillance Act of 1976.

S. 3197 and H.R. 12750 represent a continuation of a recent dangerous trend in proposed legislation. While purporting to fill a technical need, such as clarifying the law regarding national security surveillance or the confusion in the current Title 18, U.S.C., such bills as S. 3197 and S. 1 actually make substantive changes. In these two cases, the changes are in the direction of favoring the power of our government over the Constitutional rights of us, the people of the United States. In our haste to establish justice, insure domestic tranquility, and provide for the common defense, we fail to secure the blessings of liberty to ourselves and our posterity.

The disclosures of Watergate and recent widespread illegal actions by government intelligence agencies underline the need for more effective controls on the investigatory powers of the executive, particularly those (such as electronic surveillance) which have the potential for abuse going far beyond the original purposes of the investigation. There is general recognition that Congress must take steps to prevent such activities in the future, and there is currently a willingness in both the Congress and the Executive to do so. We must take care, however, that this newly-found consensus does not lull us into enacting laws that do not really provide the safeguards that they were intended to provide.

The mere fact that S. 3197 has support from such diverse individuals as President Ford, Senator Kennedy, Attorney General Levi, Congressman Kastenmeier, Senator Hruska, Senator Mathias, and Congressman Wiggins is suspect. These people have basic underlying political principles which are so different from each other that each must be reading what he wishes to see into the bill. Upon examination of their various statements, this is indeed the case. In their statements in the Congressional Record<sup>1</sup> on the introduction of the bill on March 23, 1976, Senators Kennedy and Hruska each praise different aspects of the bill. Senator Kennedy speaks of it as a "starting point from which to fashion final legislation," while Senator Hruska calls it "a good bill, a balanced bill." This is not the broad consensus which is inferred by the list of co-sponsors. I urge the Senate Select Committee on Intelligence to look carefully at what they are doing, and not to be conned by the supposed "extraordinary spirit of constructive cooperation"<sup>2</sup> cited by Senator Kennedy. Look at the merits (and lack thereof), not the supporters, of this legislation. We must not allow this non-existent consensus to force passage of a bill which is, at best, meaningless.

S. 3197 will have no effect on curbing Executive wiretapping in the name of "national security." While intending to circumscribe 18 U.S.C. 2511(3), which exempts foreign intelligence and national security surveillance from the limitations in the rest of Chapter 119, the proposed Chapter 120 preserves the basis of 2511(3) in the new section 2528. The new bill, therefore, merely provides the Executive with a new option: either it can abide by the safeguards (which, as I explain below, are not very safe) set forth in S. 3197, or it can continue the kinds of abuses which were permitted in the past under 2511(3). There remains, of course, the third option provided under Chapter 119, the normal surveillance procedure for persons suspected of major criminal activity.

<sup>1</sup> Kennedy, Edward M. on the Introduction of S. 3197; Congressional Record S3987, March 23, 1976. Hruska, Roman L. Ibid., S3990.

<sup>2</sup> Kennedy, Ibid.

In initiating a wiretap, the flowchart of the Attorney General's (or his designate's) thought might go like this: (see figure 1.)

In his introductory statement, Senator Kennedy said:

"... Congress is not attempting to circumscribe the inherent constitutional power of the President, whatever that power might be as determined by the Supreme Court. I have grave reservations about the existence of any such power, but this bill certainly cannot decide that issue."<sup>1</sup>

Although both Attorneys General Saxbe<sup>2</sup> and Levi<sup>3</sup> have said that they will not use this inherent constitutional power, I am not so sanguine about future administrations. If S. 3197 is not an attempt to define that power, what is the purpose of the bill? The only way the Supreme Court is going to provide boundaries for implicit executive surveillance is in the interpretation of explicit Congressional legislation. S. 3197 ducks the very question it is intended to address.

Every President from Franklin Roosevelt to Richard Nixon has used his nebulous "constitutional powers" to order warrantless electronic surveillance. S. 3197 contains nothing to discourage this from happening in the future. In fact, it would add to the opportunities. All the President need show is a vague connection with an agent of a foreign power (or any foreign visitor employed by his government—which includes friendly diplomats and almost every citizen of a socialist country) and he has an entire legal procedure prescribed—one which avoids the usual prohibitions on the use of information unrelated to the original purpose of the surveillance, the usual requirements of notice to those spied upon, and the requirement of the identification of the subject. By broadening the authorization and removing many of the protections included in Chapter 119, the proposed Chapter 120 merely offers the Justice Department another choice before it has to resort to 2511(3). It would do nothing to limit the potential for abuse.

Our recent history is filled with examples of erroneous and malicious assertions of connections with "foreign powers." The International Communist Conspiracy which drove this country into hysteria in the early 1950's has been proven to have been a fiction, carried on by Senator Joseph McCarthy and others for their own purposes. A new McCarthyism could create millions of new "foreign agents," each subject to be a target of Chapter 120. Even more recently, attacks were made on the civil rights and anti-way movements by the Johnson and Nixon administrations in the name of "national security." The wiretapping of Dr. Martin Luther King, Jr. and numerous domestic dissident organizations (since prohibited in the *Keith*<sup>4</sup> decision) was justified by a claim that they were dupes or tools of foreign powers.

There is an American tradition to assign unpleasant or incomprehensible realities to "foreign" factors—witness the blame for the current unemployment situation heaped on "illegal aliens" and Vietnamese refugees. American patriotic (and chauvinistic) pride refuses to acknowledge that anything can go wrong in this country; it must be caused by outside factors. Ideas which are foreign in concept become foreign in attribution. Scapegoating is part of our national heritage. This fact, which can be verified at almost any time in our 200-year history, lends little comfort to the protections offered by S. 3197.

The predecessor to your Committee, the Church Committee, recommended amendment of the surveillance laws to permit wiretapping of foreigners engaged in hostile intelligence activity.<sup>5</sup> It did not recommend expansion of surveillance of citizens or resident aliens beyond those suspected of major crime, as provided in Title III of the 1968 Omnibus Crime Control Act. Their recommendations were intended to deal with the reality; S. 3197 is a justification for expansion of government wiretaps on Americans. Intelligence is not such a major consideration as to abrogate First and Fourth Amendment rights. Americans who are not suspected of major crimes should not have their Constitutional rights taken away. (In fact,

<sup>1</sup> Ibid.

<sup>2</sup> Saxbe, William. Testimony before the Senate Foreign Relations Subcommittee on Surveillance, 93rd Congress. Reported on p. 6 of the Report of that Subcommittee and the Judiciary Subcommittee on Administrative Practice and Procedure on Warrantless Wiretapping and Electronic Surveillance, February 1975.

<sup>3</sup> Levi, Edward H. Letter to Senator Kennedy March 23, 1976; included in reference (1) p. 8:989.

<sup>4</sup> *U.S. v. U.S. District Court*, 407 U.S. 297 (1972).

<sup>5</sup> "Intelligence Activities and the Rights of Americans." Book II of the Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. (Report 94-755). P. 327, Recommendation 52.

I do not believe that wiretapping of Americans is justified under any circumstances. But that's not relevant to this bill.)

Even the tapping of foreigners is not conducive to good international relations. As Professor Christopher H. Pyle has written:<sup>1</sup> "Visiting the United States could become as annoying as touring Communist countries, where clandestine searches of hotel rooms and luggage are a common occurrence." Friendly diplomats, United Nations missions, visiting foreign relatives, and other could become the targets of surveillance. If America is "the land of the free," we ought to show a little of it to our guests. At the very least, targets of surveillance should be restricted to conscious agents of hostile foreign powers who intend to do harm to the United States. It probably should be prohibited altogether, and certainly should be limited to those persons suspected of major criminal activity. We should not impose a double standard for those Americans who happen to associate with foreigners (such as an advertising representative for Iranian National Airways) and those who do not.

The requirement of a court order for non-emergency wiretapping under S. 3197 has been shown not to be a significant obstacle. Of the 704 requests for such orders under Title III during 1975, only three were denied.<sup>2</sup> In the six-year history of the Act, only 0.267% of the requests have been refused.<sup>3</sup> If the Attorney General (or District Attorney) wants to surveil someone, the courts will not stop him.

Another problem in S. 3197 is that the bill nowhere specifies who is to do the surveillance, file the application, etc. At the very least, the CIA and military intelligence agencies should be excluded; probably the FBI should be specifically named as the only authorized surveiller within the United States on foreign intelligence cases.

In his opening statement, Senator Hruska<sup>4</sup> stated: "(the judges) will be supplied not only with the names and address of the persons actually subject to surveillance . . ." This is untrue on its face. In S. 3197 Sec. 2524(a)(4)(i), the application for an order need only include "the identity or a characterization of the person who is the subject of the electronic surveillance." I hope that the remainder of the debate on this bill will not be characterized by mistaken statements. It says little for the character of the Senate, or for the merits of this bill, that its proponents must resort to deception. I also fail to understand why the bill is not written as Hruska says it is; is our foreign intelligence information so secret that the Judge who is to authorize the interception cannot know who the subject is? If so, I fail to see how he can make a meaningful and informed decision as to whether the order is justified.

A sincere attempt is made in S. 3197 to invoke some mystical sort of minimization procedures to protect the subject from having personal conversations overheard. I think that any such specifications are hypocritical. The very nature of the clandestine surveillance process makes minimization impossible. As Richard Nixon deplored in *Halperin vs. Kissinger*:<sup>5</sup>

" . . . where wiretaps are concerned, . . . conversations inevitably intermingle, a personal conversation with a conversation that may deal with substantive matters of very great importance. . . .

"The difficulty is the field officer with the earphones on is listening to something apparently, and through the years has not felt that he could or should make that judgement. The FBI was bending over backwards, never knowing what might appear to be a very casual phone conversation about setting up a date for a girl friend or a boy friend or what have you, might lead to some other source of contact.

"As a matter of fact, the amount of material included should be as limited as possible. But it is apparently very difficult to do that."<sup>6</sup>

<sup>1</sup> Pyle, Christopher H. "A Bill to Bug Aliens," the Nation, May 29, 1976. Reprinted in the Congressional Record at E2874-6.

<sup>2</sup> Seitel, Nelson. "New Jersey Ranks First in Volume; Sharp Drop in Wiretap Orders Reported in State and City," New York Law Journal, May 14, 1976. Reprinted in the Congressional Record at E2904.

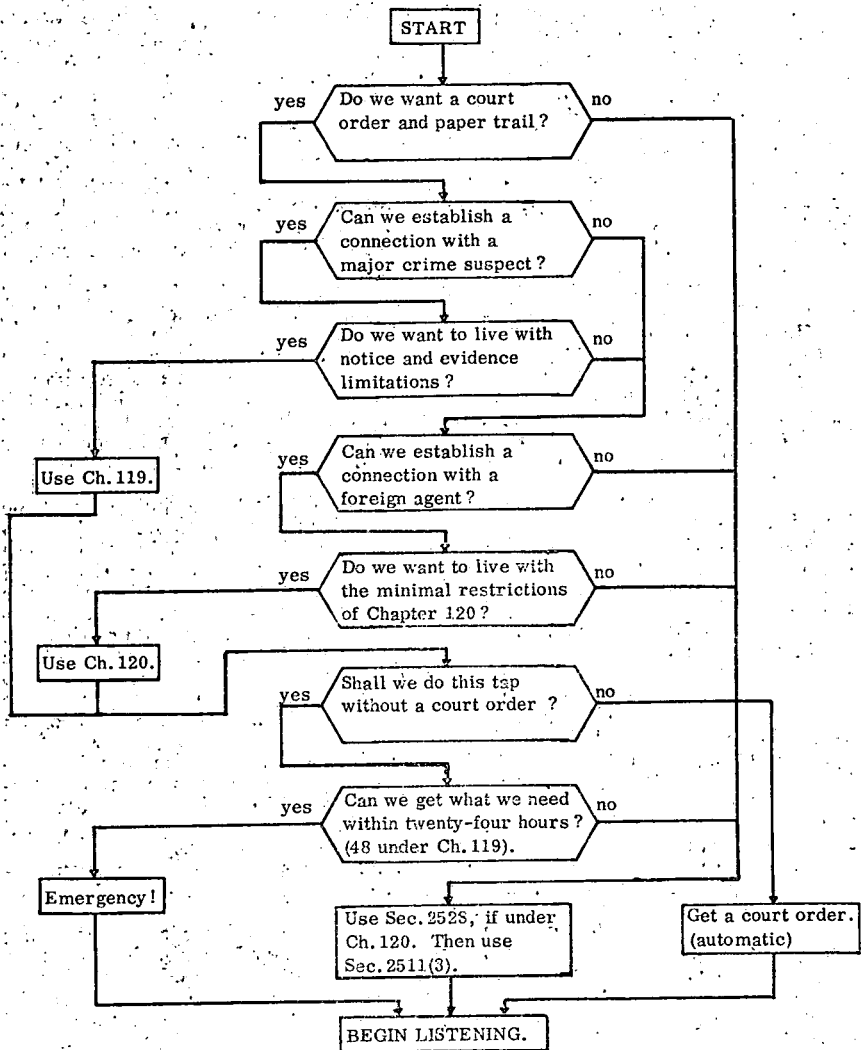
<sup>3</sup> Editorial, "Controlling Wiretaps," the New York Times, June 15, 1976.

<sup>4</sup> Hruska, Op. cit. (1).

<sup>5</sup> *Halperin v. Kissinger* (Civil Action No. 1187-73).

<sup>6</sup> Deposition by Richard M. Nixon, *ibid.*, quoted in Civil Liberties Review, June-July 1976, p. 84.

## HOW TO OBTAIN A LEGAL WIRETAP UNDER S. 3197, AS PROPOSED:



Note that all paths end at the same point. There are no non-productive branches.

The use of warrantless surveillance in emergency situations, as specified in 2525(d), is another example of suspension of Fourth Amendment rights. It should be deleted, as should the analogous provision in Chapter 119. In subsection (2) of that subsection, the surveillance is allowed to continue for twenty-four hours or until the application is denied. It is unclear whether that denial is by the district court judge, or by the appeal process taken to the three-judge panel or Supreme Court as specified in 2523(b). I also can find no mention in S. 3197 of the permissible use, or lack thereof, of information obtained from an emergency tap for which a court order was not later obtained. Such information should, of course, be forbidden to be used in any manner.



I fail to understand any justification, as set forth in 2526(d), for failing to notify the subjects of an unauthorized tap of the tap's existence. Such justification is apparently advanced if the subject is not a citizen or resident alien, or if the surveiller can show "good cause" twice. There is a specific exemption for notice (2526(c)) for authorized taps; I fail to see why we give suspected criminals rights (under Chapter 119) that we deny people who associate with foreigners.

This fact, coupled with the invitation to a fishing expedition contained in 2526(a), makes Chapter 120 far preferable to Chapter 119 from a prosecutor's point of view. If this becomes law, I can foresee many criminal cases being called foreign intelligence in order to avoid the notice and relevancy restrictions of the 1968 Crime Control and Safe Streets Act Title III. S. 3197 thus considerably broadens prosecutorial powers, rather than defining Presidential ones. I hope that this is not its intent.

1968 was a year in which we were reacting to uprisings in the cores of our cities in the summers of 1966 and 1967 and the spring of 1968. The hysteria at the lack of police control at these events led to moves in Congress to vastly increase the power of law enforcement agencies. Such horrors as no-knock raids and emergency warrantless wiretapping were rushed through the 90th Congress without being considered in the light of the Constitution and the Bill of Rights.

1976 is a very different year. In our Bicentennial, we should have a renewed appreciation and respect for the principles on which this country was founded. In addition, we have just come through four years of unprecedented revelations of the abuse of governmental power by a Vice President, a President, three Attorneys General, and a generation of FBI and CIA directors. If anything, the pendulum should be swinging the other way.

And it is. The people of the United States do not want, and will not tolerate, further infringements on their rights. I hope that the above recitation of some of the problems included in S. 3197 will help to convince you not to pass this bill. It would not be good politics in an election year, despite the broad support for the bill in Washington. The District of Columbia is not even represented in Congress; it should not be allowed to impose its penchant for governmental power on the citizens of the United States and their friends from around the world. Apparent concessions from the Republican administration should not lull the Democratic Congress into supporting a bill that is inconsistent with Democratic, liberal, libertarian, and American ways of thought.

Thank you.

STATEMENT OF DOROTHY R. STEFFENS, EXECUTIVE DIRECTOR, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, JUNE 28, 1976

The Women's International League for Peace and Freedom has long been concerned with individual freedom and the preservation of our civil liberties as guaranteed in the Bill of Rights. We find the foreign intelligence wiretap bill a matter of grave concern.

The Fourth Amendment to the U.S. Constitution is entitled "Respect for Privacy and Property." It establishes the right of U.S. citizens to be "secure . . . against unreasonable searches and seizures." We believe that the foreign intelligence wiretap bill would infringe on our rights under this amendment. We oppose the invasion of privacy that wiretapping, in any situation, represents. We find it particularly distressing that Congress is seriously considering a bill which empowers the government to conduct wiretaps against American citizens who are not engaged in any illegal activities.

The bill has been referred to as a national security measure. Our nation's security may be threatened from within as well as from without. We suggest that the dangers to our nation are not from citizens acting lawfully, but from government abuse of citizens rights. The bill does not provide sufficient protection against the type of abuses uncovered in the past year by Senator Church's Committee on Intelligence.

Another area of grave concern to us is the Presidential emergency clause. As it now reads, the provision assumes that the President already has the power to wiretap. No such authority has ever been given the Executive. The use of such potentially abusive authority is and always has been illegal. Any change to this would provide for government by policy and not by law. We urge that the Presidential emergency clause be deleted.

Therefore we urge the Senate Select Committee on Intelligence to give sufficient and careful consideration to the important issues raised here, and not to report out legislation that would violate the Constitutional guarantees of the Bill of Rights.

STATEMENT OF RAYMOND S. CALAMARO, EXECUTIVE DIRECTOR, COMMITTEE  
FOR PUBLIC JUSTICE, JULY 1, 1976

Thank you for inviting the Committee for Public Justice ("CPJ") to comment on this bill.

The CPJ is foursquare opposed to S. 3197.

This legislation was written with the admirable intention of: "... end[ing] the all too common abuses of recent history by providing ... substantive and procedural limitations on the heretofore unchecked power of the executive branch to engage in electronic surveillance for national security purposes. . . ." (Congressional Record, 3/13/76 at S. 3987).

The CPJ would strongly support legislation which would truly accomplish these goals; but S. 3197 will not. In fact, S. 3197 would do just the opposite by *expanding* such unchecked power of the executive branch. It is a well-intentioned but faultily-written piece of legislation.

The bill has many serious defects, but I shall concentrate on the two most significant:

1. The "inherent power" loophole: Section 2528 recognizes and preserves intact "any constitutional power the president may have" to conduct bugging, wiretapping, and other intrusive techniques related to "foreign intelligence."

A. This creates a loophole as large as or larger than the bill itself.

B. It reinforces a misinterpretation of the law: that Congress *may not* legislate in this area to limit presidential power. On the contrary, Congress may and should act here. The Supreme Court in the *Keith* case (*United States v. United States District Court*, 407 U.S. 297 (1972)) left open the question of whether the President could, in the absence of legislation, wiretap without a warrant in certain situations. However, as Senator Gaylord Nelson points out in his statement on this bill printed in the March 29, '30, 1976 hearings on this bill before the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures;

(1) "... Justice White notes, 'the United States [did] not claim that Congress is powerless to require warrants for surveillances that the President otherwise could not be barred by the Fourth Amendment from undertaking without a warrant.' 407 U.S. at 338 n. 2. Justice White goes on to quote from the transcript of the oral argument, in which Assistant Attorney General Mardian concedes that Congress has broad power to limit surveillances which the President and Attorney General could otherwise authorize. 407 U.S. at 339 n. 3."

2. "... [Other Court] decisions [besides *Keith*] leave little, if any, room for a President to claim the right to authorize warrantless electronic surveillance of American citizens."

C. This section, recognizing and sanctioning such a dangerous power suggests that Congress has learned no lessons from the tragedies of the Vietnam War, Watergate and the recent revelations of crimes and abuses by the CIA, FBI and other intelligence agencies. A common thread in all of these has been a readiness to entrust too much power in the president. We should have learned that potentially dangerous presidential powers—particularly powers to engage in conduct which presents an immediate threat to constitutional rights—should be narrowly confined, not loosely expanded with legislative blank checks.

To refer again to Senator Nelson's March 29-30 testimony, he began by saying, "I had reservation about that section [on Presidential power] when we put the bill in. It seems to me that the Committee really ought to strike it from the bill."

The CPJ wholeheartedly agrees with Senator Nelson here while also agreeing that the portion of this section which repeals 18 U.S.C. 2511 (3) should be preserved.

2. Wiretapping and bugging of law-abiding U.S. citizens and non-citizens: S. 3197 is so vague and imprecise that it is not limited, as its name suggests, to foreign intelligence surveillance. A good deal more than this kind of information can be gathered, through government intrusive techniques, under this bill. In addition, the bill reaches ordinary citizens who are not spies and have broken no law. For example,

A. S. 3197 would allow the government to tap and bug "agents of a foreign power." But, as Senator John Tunney—the only member of the Senate Judiciary Committee to vote against S. 3197—said before this subcommittee on June 29, 1976:

"One criterion of the definition of 'agents' includes people with no direct links with foreign countries, who are not acting at the direction of any foreign power, and who do not even know they are aiding a foreign power, but only know they are aiding someone who may turn out to be an agent. For example, someone driving an 'agent' to an appointment could himself be deemed an 'agent'."

. B. The other pernicious element here is that it allows government intrusion against people conducting "clandestine intelligence activity." But that term is defined nowhere and is another blank check which could allow a president to conduct unconstitutional surveillance. In short, "clandestine intelligence activity" is specifically intended to include otherwise lawful, constitutionally protected activity by citizens and non-citizens alike.

#### STATEMENT OF THE NATIONAL COUNCIL OF JEWISH WOMEN, JULY 15, 1976

The National Council of Jewish Women, an education, community service and social action organization of 100,000 women in Sections throughout the United States has since its inception 84 years ago been committed to protecting the rights of the individual. At our last Biennial Convention, the following resolution was adopted:

##### *"1. Individual rights and responsibilities*

"The National Council of Jewish Women believes that the freedom, dignity and security of the individual are basic to American democracy, that individual liberty and rights guaranteed by the Constitution are keystones of a free society and that any erosion of these liberties or discrimination against any person undermines that society.

"We Therefore Resolve:

"1. To work for public understanding and the protection of the civil liberties guaranteed by the Constitution of the United States, including The right to privacy."

The proposed bills S. 3197/H.R. 12750 pose a threat to the individual's right to privacy and represent an unwarranted intrusion upon the individual not engaged in any criminal activity by authorizing electronic surveillance within the United States for foreign intelligence purposes. The widespread illegal activities in intercepting mail, wiretapping and electronic eavesdropping of the F.B.I. and C.I.A. brought to light during the recent hearings of the Senate Select Committee on Intelligence (the Church Committee) underscored the necessity for guidelines to be established governing the activities of governmental intelligence agencies. The intent of such guidelines was to define and limit the scope of such activities, not to enlarge and legalize such intrusive activities. The affect of the proposed bills will legalize the heretofore illegal activities of the governmental intelligence agencies and establish a mechanism to foreclose any effective challenge by the individual under surveillance.

The Church Committee rejected the Administration's contention that some lawful conduct should be the basis for surveillance and concluded that if existing laws were inadequate to protect national security information from foreign agents, then the laws should be amended rather than create a new "dangerous basis for intrusive surveillance."

S. 3197 authorizes in the name of national security the issuance of warrants for electronic surveillance "under circumstances where a person has a constitutionally protected right of privacy" upon a showing that there is probable cause to believe that the target of the electronic surveillance is a foreign power or enterprises controlled by (it) or an agent of a foreign power, i.e. a person engaged in clandestine intelligence or terrorist activities, or who conspires with, or knowingly aids or abets such a person in engaging in such activities. The terms "conspiracy" and "clandestine intelligence activities" are vague, indefinite and imprecise and open the door to interpretations and definitions by the Attorney General which would target citizens in the pursuit of lawful activities and lead to widespread political surveillance.

Under S. 3197 the mechanism for obtaining a warrant authorizing the electronic surveillance is such that the government may twice appeal a denial of such application by the seven district court judges designated by the Chief Justice of the United States to grant such orders. The subject of the warrant, however, has very limited rights only after the fact of surveillance, to challenge the use of the information so acquired. And, inasmuch as the orders are obtained ex parte, i.e. without notice to the other party, there is no mechanism whereby the individual affected will ever become aware that he has been subjected to such surveillance.

The hope or expectation that the courts will be circumspect and zealous of the individual's constitutional rights of privacy is not justified in the light of past experience. During the period of 1969-1975 a total of 4863 applications for orders authorizing or approving the interception of wire or oral communications were granted. Only 13 such applications were denied during the seven year period.

The National Council of Jewish Women views S. 3197 as a negation of the principle that we are a nation of laws not men. To empower government to invade the privacy of citizens engaged in lawful activity is a denial of that principle. S. 3197 is a blueprint for and legal sanction of heretofore illegal and grievously intrusive governmental activities and an insulation of government from effective scrutiny and challenge. It would provide an open door for the repetition and continuation under color of legal right of the unwarranted and illegal mail openings, break-ins, wire-taps and buggings by governmental intelligence agencies recently brought to light and condemned by the Church Committee and the American people.

LETTER TO SENATOR BIRCH BAYH FROM THE ASSOCIATION OF THE BAR OF THE  
CITY OF NEW YORK, JULY 1, 1976

DEAR SENATOR BAYH: This Committee has maintained a keen interest in current congressional activities in the area of domestic and foreign intelligence. We are in the early stages of preparing a report on certain legislative proposals which have and will be made for curbing the abuses which recent investigations have brought to light. In the course of our work, we have taken note of S. 3197 which was introduced on March 23, 1976, as well as certain amendments thereto adopted earlier last month by the Senate Judiciary Committee. In keeping with this Committee's role in commenting upon important federal legislation, we hope you will find the following helpful as work on S. 3197 proceeds. In this connection, we should mention that many of these comments have already been transmitted orally to Kenneth Feinberg of Senator Kennedy's staff.

To begin with, our Committee applauds the basic intention underlying S. 3197. Two years ago, this Association recommended passage of Senator Nelson's Surveillance Practices and Procedures Act (S. 2820) in a full report prepared by this Committee and the Committee on Civil Rights (Federal Legislation Report No. 74-4, June 24, 1974), a copy of which we enclose. The hearings and reports of the House and Senate Select Committees on Intelligence, together with other disclosures of the past year, make it apparent that the kind of legislation we supported in 1974 is needed to protect individuals, whether citizens or aliens, from the kind of intrusion upon their fundamental rights and liberties which has been all too prevalent. S. 3197 is certainly a major step in that direction. We do not agree with the view that the bill legalizes more electronic surveillance than it inhibits. Experience has shown that making surveillers stop, think and justify their intended actions by mandated judicial warrant procedures, together with the other procedural safeguards and sanctions contained in S. 3197, is far more likely to minimize invasions of privacy than relying on undefined concepts and haphazard judicial review.

Our Committee is thus in agreement with the purposes of S. 3197. Our 1974 Report (enclosed) reviewed the historical background and considered the constitutional questions presented by such legislation, and we incorporate that discussion here. We note, however, that our conclusion in the 1974 Report, that legislation subjecting foreign intelligence surveillance to judicial warrant procedures does not unconstitutionally restrict presidential power, is consistent with the conclusion expressed by Attorney General Levi in his testimony last March before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, supporting the constitutionality of S. 3197.

Notwithstanding the foregoing, we are extremely concerned about the phrase "engaged in clandestine intelligence activities" in Section 2521 of the bill. That phrase is without any clear meaning, especially since it is used together with "sabotage" and "unlawful terrorist activities," which carry a definite connotation of clear and present danger to domestic well-being. The phrase opens the door wide to surveillance which, we believe, would not be authorized by present law. It should either be specifically defined or eliminated.

We turn now to the following specific comments on S. 3197 as amended by the Judiciary Committee:

1. "INHERENT POWER" OF THE PRESIDENT

We are gratified to note the substantial revision of Section 2528 of the bill, and the corresponding repeal of Section 2511(3) of chapter 119, so as to eliminate the purported congressional recognition of an inherent constitutional power of the President to conduct surveillance activities. The Supreme Court in *United States v. United States District Court*, 407 U.S. 297 (1972) left open the question

of whether there was any such inherent power with respect to foreign intelligence activities. The hearings and reports of the two Select Committees have made it clear that the FBI has always relied upon the alleged inherent constitutional power of the President to conduct intelligence activities for the reasons set forth in 18 U.S.C. § 2511(3) (i.e., to obtain information "deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities") as the principal, if not sole, source of its power to engage in the very activities which new legislation should seek to eliminate. There is no reason why Congress should expressly recognize any such power in the text of new legislation.

## 2. REMEDIES AND SANCTIONS

We also support the Committee amendments which purport to add criminal sanctions for willful violations of the statutory procedures and civil remedies for surveillance not undertaken in good faith reliance on court orders or statutory authorization. Although we have some specific comments concerning the sanctions, we cannot emphasize too strongly that a bill of this sort absent criminal and civil sanctions is not a meaningful response to the abuses recently brought to light.

(a) In his statement accompanying introduction of the bill, Senator Kennedy said that it "requires that a judicial warrant be secured before the government may engage in electronic surveillance for purposes of obtaining foreign intelligence information" (emphasis added). However, even with the adoption of the criminal sanctions and civil remedies contained in Chapter 119, S. 3197 in its present form is still not mandatory; it does *not* "require" federal law enforcement authorities to act pursuant to its procedures, but provides only (Section 2522) that applications for court orders under the chapter "are authorized" and that a judge to whom such an application is made "may grant an order." We suggest that the bill be amended specifically to prohibit electronic surveillance unless conducted pursuant to the provisions of the Act or Chapter 119.

(b) We agree that exclusionary rules restricting the use in trials and other proceedings of information obtained or derived from intelligence surveillance are an important mechanism for enforcement of the statutory mandates. However, we have the following comments concerning the exclusionary sections of S. 3197:

(i) Section 2525(d) (2), relating to the use of information obtained by emergency surveillance, governs disclosure not only in court proceedings, but also in proceedings before any "grand jury, department, office, agency, regulatory body, legislative committee or other authority of the United States, a state, or a political subdivision thereof." The same is true of Section 2526(d), providing for motions to suppress. However, Section 2526(c), governing disclosure of information obtained pursuant to a court order under the statutory procedures, is limited to disclosure in court proceedings. The implication is that such information *may* be used in proceedings other than in court, if obtained in accordance with the statutory procedures, but there is no provision for review prior to disclosure such as provided by Section 2526(c) for court proceedings. This discrepancy should be corrected by repeating the scope of Sections 2525(d) and 2526(d) in the corresponding place in Section 2526(c).

(ii) Section 2526(c) also requires that, prior to admission into evidence or other disclosure in a court proceeding, the court determine "that the surveillance was authorized and conducted in a manner that did not violate any right afforded by the Constitution and statutes of the United States . . ." but the court is not specifically admonished to determine that the procedures of this Act were complied with. The implication is thus left that the court could be satisfied that no specific personal right was violated even though the procedures of the Act were ignored, and thus admit the evidence. We believe that in addition to the language quoted above, the Act should require a specific finding that the procedures of Sections 2524 and 2525 were complied with.

(c) While, as noted, we support the inclusion of civil sanctions, we think the opportunity should be taken to make the civil damage provisions of 18 U.S.C. § 2520 more meaningful. In today's economy, and considering the kinds of serious abuses of individual rights which have been disclosed by the Senate and House Select Committees, a damage award limited to \$1,000 is neither meaningful compensation nor sufficient inducement for individuals to undertake federal court litigation to vindicate their rights. We believe that plaintiffs should be permitted to prove actual damages in an amount equal to the actual injuries they have suffered and that the formula of \$100 per day or \$1,000 per violation should

be a minimum rather than a ceiling. While we approve of the provision for punitive damages in egregious cases, the natural reluctance of judges to impose punitive damages makes that provision no substitute for actual compensatory damages in cases where unauthorized surveillance has, as sometimes happens, ruined an individual's social life, seriously interfered with his livelihood or caused provable damage to his reputation or his emotional stability.

(d) We do not agree with the denial of standing to commence civil damage actions to anyone meeting the definition of an "agent of a foreign power" in Section 2521(b)(1)(i). It can well happen that innocent individuals, such as non-resident aliens working in foreign embassies or U.N. missions, could be made targets of surveillance in violation of the statutory mandates or victims of unauthorized disclosure of intelligence information, and could suffer damage thereby. Where such damage can be proven, we see no reason to deny such a person standing to maintain an action.

(e) If the intent of the Judiciary Committee was, as we believe, to make willful violations of the statutory procedures a crime, Section 4(a) of the bill does not adequately accomplish that result. Merely inserting "or chapter 120" into 18 U.S.C. § 2511(1) simply adds an additional *defense*, based on compliance with the new legislation, to the crime enunciated in that Section.

But the scope of § 2511 is not co-extensive with the scope of the new bill; "interception of wire or oral communications" under Section 2511 is a more narrow term than "electronic surveillance" as defined in S. 3197. In order to make all willful violations of the new legislation criminal, Section 2511 should be amended to encompass fully the activities covered by the new bill.

### 3. "AGENT OF A FOREIGN POWER"

The majority of our Committee believes that the phrase "agent of a foreign power" (§ 2521(b)(1)) is too vague, despite the attempt to define it. It is unclear what criteria are to be used in deciding whether a person is engaged in activities "pursuant to the direction of a foreign power." Must the individual be aware of the involvement of the foreign power? Must the involvement of the foreign power be open and direct? The majority believes that the definition ought to require that the foreign power be *directly* involved in controlling or financing the activities to be surveilled and that, at least where the target of the surveillance is not a direct employee of a foreign power or its agent, there be some requirement that the target be aware of the involvement of a foreign power and that the applicant be required to demonstrate its grounds for believing such to be the case. That could be accomplished by amending the definition, inserting such a requirement in the application under Section 2524(a), or both. Without such changes, the majority think this definition may be used to justify electronic surveillance of domestic political groups and legitimate political activities, solely upon the suspicion that there has been some indirect involvement of foreign powers, of which the persons whose privacy will be invaded have not the slightest knowledge.

A significant minority of the Committee thinks that the definition should not be changed. This group believes that whether the person to be surveilled knows or is ignorant of the involvement of a foreign power is irrelevant to the showing of a need for surveillance and should not enter into either the definition or the required showing for obtaining an order under Section 2524.

### 4. CONTENT OF THE REQUIRED APPLICATION

With respect to the showing required in support of an application for an order approving electronic surveillance (Section 2524), we believe that the statute ought to require the same kind of disclosure with respect to the *sources* of the information upon which the applicant's belief is based as is required to obtain surveillance orders in the domestic law enforcement area. *See, e.g., Spinelli v. United States*, 393 U.S. 410 (1969). If independent evaluation by the court of the need for electronic surveillance is to be effective, the court must be informed about the sources of the information, including, for example, the applicant's prior experience, if any, as to the reliability of such sources and whether the information is corroborated by more than one source.

### 5. USES OF INTELLIGENCE INFORMATION (SECTION 2526)

(a) In its present form, Section 2526 purports to limit the use of information obtained by foreign intelligence surveillance to "the purposes set forth in section 2521(b)(3)" or for criminal law enforcement. But Section 2521(b)(3) contains

only the bill's definition of "foreign intelligence information" and does not set forth any discernible "purposes for which such information may be used, much less any restrictions governing such use. This, we believe, is a major failing of the bill. Misuse of intelligence information has been an abuse at least as serious and far reaching as those involved in the gathering of such information. Legislation which regulates the intelligence-gathering process, but is practically silent on the permissible uses of intelligence, accomplishes only half the job. Regulating the use of intelligence information is neither impractical nor without precedent. Section 552(b) of the Privacy Act of 1974 (5 U.S.C. § 552a(b)), governing permissible uses of personal data in agency files, provides a model of such an effort which could be adapted with appropriate deference to the sensitive nature of foreign intelligence information.

(b) We support the concept of "minimization procedures" as set forth in the bill, as one method of insuring the least possible intrusion upon individual privacy and liberties. We do, however, believe that the provisions with respect to minimization in S. 3197 do not go far enough. Specifically, we would recommend the following:

(i) While we can appreciate why some commentators might desire permanent retention of information accidentally acquired which is neither "foreign intelligence information" nor evidence of a crime, we believe that, in the long run, there is no justification for preserving such information in government files where it can only be misused and put to no legitimate use. (See this Committee's Report on the Privacy Act of 1974, Federal Legislation Report No. 74-9, November 15, 1974.) Accordingly, we would propose that the bill include a requirement that, within a specified time after the termination of a surveillance order, in cases where such extraneous information is obtained, notice of that fact be given to the target of the surveillance and such person be given the right to demand destruction of all such non-foreign intelligence information. To guard against dangerous or premature disclosure of the existence of ongoing investigations, this section could contain the same procedures for judicial postponement of the notice requirement as now appear in Section 2526(e). An even broader notice requirement, together with similar provision for judicial postponement, was included in the 1974 Nelson bill, and was supported by our 1974 Report. We again urge the adoption, as part of the required minimization procedures, of the notice requirement suggested above.

(ii) We are concerned about the proviso in Section 2526(b) that minimization procedures shall not be deemed to preclude retention and disclosure of information accidentally acquired which is not "foreign intelligence information," but which is evidence of a crime. That proviso, it seems to us, would permit law enforcement agencies to conduct illegal domestic surveillance under the guise of foreign intelligence surveillance, where they do not have "probable cause" to obtain warrants for surveillance. We thus believe that the bill should contain an additional proviso that information or evidence accidentally obtained in the course of foreign intelligence surveillance, while it may be disclosed to the appropriate domestic law enforcement agencies, would remain subject to all of the established statutory and Fourth and Fifth Amendment protections and restrictions upon admission into evidence or other use in the criminal law enforcement process. The proviso which has been added to Section 2526(a) accomplishes this result in part, although many of the protections we have in mind might not be properly characterized as "privileges" or as pertaining to "privileged information." We believe the full protection noted above is what is really required.

#### 6. DESIGNATION OF JUDGES

Section 2523, concerning designation of judges to hear applications under the statute, would be strengthened by the following changes:

"(a) We believe it would be wise to limit the designation of such judges to finite terms, three years, for example, in order to permit fresh approaches and fresh insights to be brought to bear on these problems.

"(b) We would also suggest a requirement that all opinions of the special court of appeals, together with the test of all orders under the Act and any written opinions of the designated district court judges, be published, with suitable redaction to prevent the disclosure of the identity of targets of surveillance and other confidential details. It would be sufficient to leave to the discretion of the court precisely what material should be omitted from published orders and opinions."

## 7. ATTORNEY GENERAL'S ANNUAL REPORT

Finally, Section 2527 should be amended to require that the Attorney General's annual report also disclose the same statistical information with respect to intelligence actions initiated pursuant to Section 2528, or otherwise undertaken without compliance with the statutory procedures, and that the report should break down the statistics to show the number of actions undertaken pursuant to each section or without specific statutory authority. This will at least make it clear to Congress and the public whether, as we still fear, there is reason to expect abuse of the power which Section 2528 purports to recognize.

We hope these brief comments, together with our 1974 Report, will be of some use to you in the further consideration of S. 3197. Members of our Committee responsible for research and reporting in this area would be pleased to discuss this legislation in greater detail with you, members of your staff, or the staff of the Judiciary Committee, who are working on the bill.

Very truly yours,

JOHN D. FERRICK,  
*Chairman, Committee on Federal Legislation.*  
STEVEN B. ROSENFELD,  
*Chairman, Subcommittee on Intelligence Activities.*

LETTER TO SENATOR DANIEL INOUE FROM DAVID COHEN, PRESIDENT,  
COMMON CAUSE, JULY 9, 1976

DEAR MR. CHAIRMAN: Common Cause appreciates this opportunity to present its views on S. 3197, the Foreign Intelligence Surveillance Act of 1976, during the Senate Intelligence Committee's deliberations on the bill. Common Cause was a strong supporter of S. Res. 400 which established an independent committee with legislative, budget and oversight powers covering the entire intelligence community. We are anxious to work with you, Mr. Chairman, and the members of this committee as you undertake the crucial task of laying down reasonable guidelines to control the operations of the intelligence community and to protect the constitutional rights of American citizens from unwarranted infringement.

Common Cause views the use of wiretapping and electronic surveillance by intelligence agencies as an area which requires immediate and sensitive treatment by this committee. Past abuses demonstrate that the existing system for utilizing these procedures has failed to protect the rights of citizens. Beyond this, wiretapping and electronic surveillance are representative of the entire panoply of investigatory methods for which new guidelines must be drawn to prevent future abuses of power.

A systematic reform of the rules under which intelligence agencies operate and the methods which they employ is an important national priority. Our general view of the controls which must be applied to intelligence agencies in a democratic society is summarized in the following recent statement of Common Cause policy.

"Common Cause should support legislation conditioning all exercises of intelligence-related domestic investigations on application for and receipt of a warrant. Warrantless actions should be allowed only in those situations where they have traditionally been allowed police not engaged in intelligence activities, e.g., hot pursuit, witnessing a crime, likelihood of flight. Warrants should be issued only on the basis of sworn statements indicating probable cause to believe that a crime has been or will be committed and should be strictly limited as to duration. Aggregate data on all investigations, conducted with or without warrants, should be made available to Congressional committees having intelligence oversight responsibilities."

The position advocated by Common Cause finds support in the final report of the Senate Select Committee to Study Government Operations with respect to Intelligence Activities which stated "as a matter of principle, the Committee believes that an American ought not to be targeted for surveillance unless there is probable cause to believe he may violate the law."

S. 3197 presents difficult choices to this committee. It is the product of good faith effort by the sponsors and the Department of Justice to establish procedures which are responsive to both the need to protect individual rights and the necessity of engaging in intelligence gathering. This bill constitutes an improvement over current practice in three important areas:

1. By requiring that a warrant be issued before most surveillance can be undertaken.
2. By requiring that the warrant be approved by a federal judge.



3. By requiring that the request for the warrant be personally authorized by the Attorney General and a White House official with responsibility in the national security area.

While recognizing the value of these safeguards, Common Cause is deeply concerned about the provisions of this bill which could authorize surveillance of American citizens not suspected of involvement in criminal activity. We are further disturbed by the lack of definition of the key terms which indicate just what sort of non-criminal activity would place citizens at risk of surveillance. As we read it, this bill would allow surveillance of citizens engaged in the exercise of constitutionally protected rights of freedom of political expression, freedom of speech and freedom of association. The vagueness of the terms "agent of a foreign power" and "clandestine intelligence activities" is an open invitation to expansive interpretation and arbitrary implementation. S. 3197 sets a standard for wiretapping which would authorize surveillance of legal activities and might allow harassment of political dissidents as has happened in recent years.

Common Cause believes that surveillance should be limited to instances where the likelihood of criminal activities can be shown. If a compelling case can be made for surveillance, with its inevitable invasion of privacy and potential for harassment of citizens not engaged in illegal activities, we urge that the bill specifically and explicitly define those situations in which non-criminal behavior should be the grounds for authorizing surveillance. The Committee should carefully consider claims that the power to wiretap is needed and should provide a legislative mandate to use that power only where absolutely necessary to protect national security goals.

In its landmark ruling in the *Keith* case [*U.S. v. U.S. District Court*, 407 U.S. 297 (1972)], the Supreme Court recognized that the requirement for a warrant before search or seizure is protective of both Fourth and First Amendment rights. Agreeing with this, Common Cause believes that wiretapping and other invasions of privacy must be kept to a minimum.

If this committee legitimizes wiretapping on a broad scale, it is difficult to see how it can or will draw a different line when it begins to draft legislative charters for the intelligence agencies. Investigatory power, unchecked by the need to show the likelihood of criminal activity or specified circumstances justifying state action, will have fateful consequences. Justice Powell stated the dangers in *Keith*:

"The price of lawful dissent must not be a dread of subjection to an unchecked surveillance power. Nor must fear of unauthorized official eavesdropping deter vigorous citizen conversation. For private dissent, no less than open public discourse, is essential to our free society."

In its present form the warrant procedure established by S. 3197 would prove an illusory check on the surveillance power. We fail to believe that less sweeping language cannot meet all legitimate needs. We urge the Committee to change the language now contained in Section 2521(b)(ii) so that grounds for a warrant are limited to suspected criminal behavior and, if necessary, well-defined non-criminal activity for which surveillance is appropriate.

Proper resolution of the problems raised in controlling wiretapping and electronic surveillance is critical to the entire effort to reform intelligence practices and protect individual rights. We hope the Committee will treat this matter with utmost care. Common Cause looks forward to working with you and the other members of the committee in the months ahead as you develop legislative controls over intelligence activities.

FRIDAY, AUGUST 6, 1976

U.S. SENATE,  
SUBCOMMITTEE ON INTELLIGENCE  
AND THE RIGHTS OF AMERICANS  
OF THE SELECT COMMITTEE ON INTELLIGENCE,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 1:55 p.m., in room S-126, the Capitol, Hon. Birch Bayh (chairman of the subcommittee) presiding.

Present: Senators Bayh, Garn, Hathaway, Morgan, and Case.

Also present: William G. Miller, Staff Director; Michael Madigan, Minority Counsel; Tom Connaughton, Elliot Maxwell, and Michael Epstein, professional staff members.

Senator BAYH. The Chair sees a quorum. We will ask the committee to come to order and proceed to the business before us.

As the members of the Committee know, we are approaching a significant responsibility for the first time in a very sensitive area. The bill which was passed out of the Judiciary Committee has been the subject of careful examination, of criticism of all kinds, and the subject of significant negotiations at staff level between ourselves and the affected Agency. It is our hope that we can strike the rather delicate balance of protecting the rights of individual citizens of this country which are sacred and unique, and at the same time not tie the hands of those agencies which are designed to protect the freedom and security of our entire country. I say to you as just one Senator who is concerned about both of these matters, this has not been an easy task.

I am prepared to make some recommendations as to how to resolve this and how to significantly improve S. 3197, but I have to say in advance that I am not totally satisfied with the product of my own thought processes. To expedite this matter, I would suggest we start with S. 3197 as reported out of the Judiciary Committee and go a page at a time. Is there any objection to that procedure?

Does anybody have an opening comment that they would like to make before we get started?

Senator GARN. Mr. Chairman, I would like to make a comment regarding the staff negotiations and the amendments proposed to S. 3197, as it came out of the Judiciary Committee. In my opinion, there has not only been a great deal of refinement, but a great deal of strengthening, and as you know by some of our conversations, more strengthening than I might like. However, I do think overall it is a better bill than the Judiciary Committee reported, and considerably strengthened in the protection of the rights of individual American citizens than it was before. That is all I have to say. I am ready to start going to work.

Senator BAYH. Thank you, Senator Garn.

I suggest we go through the bill and take a section at a time.

I have some amendments that I would like to offer and perhaps others of you have amendments you would like to offer. We will, I assume, we will agree on some and disagree on others. Where we have disagreements, let's thrash them out, and the majority will carry. Then we will pass it on and let the Senate work its will.

Senator HATHAWAY. Mr. Chairman, could I just say a couple of words before we start?

Senator BAYH. Please.

Senator HATHAWAY. I am very much concerned about some of the provisions of the bill that we are going to amend, and even some of the amendments we are going to make thereto. With the background of abuses of wiretapping and the fact that this is really an experimental bill, I have an amendment that I could offer now. I will wait until later on because it comes on page 22, but it is sort of an all-encompassing amendment, regardless of what we adopt here. We should be mandated to review what has happened on at least an annual basis and report to the Congress whether or not we think the bill has worked all right; if it hasn't, what amendments we are going to suggest to make the bill work better; or the third alternative, to recommend that the bill ought to be repealed altogether. But I am willing to wait on a page by page to take it up when it comes.

Senator BAYH. Well, I suggest we take it a page at a time. The judgment expressed in your amendment makes sense to me. Why don't we go through it section by section?

Are there any amendments to page 1?

If none, we will turn to page 2, and I would like to offer an amendment—does everybody have tab B, the definition section, section 2521, which is what we are talking about here. Starting on page 2, 2521—do you have the amendment that is labeled tab B, which would start on page 2, line 9, and would strike out all the remainder of page 2, 3 and 4, down to line 20, and make the insertions that are contained.

I might just mention basically what we are trying to deal with here. One of the concerns that many of us had was that the definitions of who was covered and the type of information that we were after was so loose, that it was rather clear we were going to subject to the possibility of electronic surveillance a lot of citizens who were exercising their constitutional rights and who had absolutely nothing to do with the kind of character, target, or subject that we are after. Now the Attorney General, in testifying before us, made it rather clear the type of individual we are after. We are after a spy, someone who is directly involved in the kind of intelligence gathering that most of us would consider to be detrimental to the national security. This amendment is designed to significantly tighten up the provisions of the definitions which cause concern.

The basic change goes to the protection of rights of American citizens. The other definitions are about the same. We were able in most instances to be able to restrict the act which would subject the individual to electronic surveillance to criminal acts. Frankly, I wish that we had been able to apply the criminal standard test across the board. The only exception that is made as far as American citizens are concerned to the criminal act standard can be found on subsection (E) on page 2 of the amendment, and I think the best

way is just to read through that together here, where we are talking about here a person who is an American citizen:

A person who, acting pursuant to the direction of an intelligence service or intelligence network which engages in intelligence activities in the United States on behalf of a foreign power, knowingly transmits information or material to such service or network in a manner intended to conceal the nature of such information or material or the fact of such transmission under circumstances which would lead a reasonable man to believe that the information or material will be used to harm the security of the United States, or that lack of knowledge by the Government of the United States of such transmission will harm the security of the United States.

Now, I want to repeat that, before a citizen can be subject to surveillance under this provision, he or she must be acting pursuant to the direction of an intelligence agency, network, or service that is engaged in intelligence activity for a foreign government. The individual who is the target must knowingly transmit information or material in a manner that is designed to conceal it under circumstances which would lead a reasonable man to believe that the information and material could be harmful to the security of the United States.

Now, the major accomplishment that resulted here is that, although we were not able to reach agreement on the criminal standard in this test, we were able to get a judicial determination of the reasonableness of the activity and the information and the whole business, which I think is a significant improvement.

On page 3, there is a definition of the type of information we are after, required for certification, in item (5). I think that is of particular importance there, where we really tighten it up a bit and require a higher standard other than on page 4, (C), where we add "installation or" in addition to "the use of an electronic". That is a technical change there. That is about all that is involved there, gentlemen. That is a significant change, I think.

Is there discussion about this?

Senator HATHAWAY. Mr. Chairman, on page 2, (E), we were talking about circumstances which would lead a reasonable man. We are talking about the judge, I presume.

Senator BAYH. Yes, the judge makes the determination.

Senator HATHAWAY. What's the difference between that and probable cause, "probable cause to lead a reasonable man?"

Senator BAYH. It's basically the same test.

Senator HATHAWAY. It seems to be the same test.

Senator GARN. Except the feeling and belief was that "the reasonable man" was a little bit stronger.

Senator HATHAWAY. It would be a higher threshold than probable cause.

Senator BAYH. Well, I know you and Senator Morgan and I are very concerned—I don't know who else was, but I know at least the three of us expressed a very deep concern about that being a departure from the criminal standard—but in the spirit of trying to get something that would begin to put some controls on the activities that are going on, we thought that that "reasonable man" test getting the judge involved in making the determination, and letting the agencies involved in this know in advance that they have to meet this test is a significant improvement over where we are now.

Senator GARN. Well, I agree. It satisfies me. We are not going to the criminal statute, because if we go, this is one area where we disagree. If we try to go the entire criminal statute, there are simply some disloyal activities of American citizens that any reasonable person would consider disloyal, but certainly are not to the point of being criminal as yet. I think it is a good balance. We have tightened it up considerably over the Judiciary Committee, and yet have not gone beyond where you would eliminate some situations that I think would endanger the security of the United States.

So I would support the amendment and the definitions in this section.

Senator BAYH. Well, thank you, Senator Garn. I know you have a great spirit of accommodation on that because I know you thought we were going too far.

Is there further discussion on that amendment on Tab B?

Is there objection to the amendment?

Senator CASE. No. I just want to know is there anything we say in the report that would open this up a little bit and maybe make it a little clearer? I think it would be helpful.

Senator BAYH. We will try our best. This is a difficult matter to grasp totally, and I think for that reason that we need a clearer explanation by staff.

Senator GARN. I think the staff can handle it.

Senator BAYH. Of course, the Senator from New Jersey and the rest of us will have a chance to look at that staff report and make recommendations as to what it encompasses.

All right, if there is no further discussion there, without objection, the tab B amendment is accepted.

May I suggest that we turn to the amendment on tab C, which is on page 5, line 9 of the bill. Gentleman, this deals primarily with the designation of judges, how it is done. It must be done publicly by the Chief Justice, both in selecting the seven district judges and the three judges of the appeal panel. The present bill permits shopping. If the agency requests surveillance from one judge and is turned down, they can shop right on down the line until they get someone to say, "yes." We prohibit that in this amendment. We would say, "You pick your judge, but if that judge says no, then the only alternative available to you is to immediately appeal." The third feature of this amendment would require the judge who first makes the decision of denial to have a written explanation of why the denial was made, why the application was turned down, to be considered as a basis for the appeal.

That is basically what we have there, gentleman. Is there discussion on it?

Frankly, I think this really strengthens it again. There has been little opposition expressed to me about this particular amendment.

Senator GARN. I don't believe there is any opposition to this amendment at all.

Senator BAYH. Is there discussion?

If there is no discussion, without objection, amendment in tab C is accepted.

May I suggest that we turn to tab D, which is on page 6, lines 7 and 8. Now, this insures that the Attorney General will have the discretion to say, yes, or no to an application for surveillance. I think

a reasonable interpretation could be made of the way in which the present bill is worded where each application must be approved by the Attorney General, that he doesn't have the discretion to say no, and so what we do here is very clearly say what the original authors intended is to change the words so that the Attorney General has the discretion to say no as well as yes.

Senator HATHAWAY. Mr. Chairman, who can apply?

Senator BAYH. Pardon me?

Senator HATHAWAY. Who can apply to the Attorney General for an application, I mean for a wiretap? Is it confined to Federal officers? Can a citizen go to the Attorney General?

Senator BAYH. It would have to be a Federal officer.

Senator HATHAWAY. It doesn't specify that. That's why I am concerned. It mentions in (1) the identity of the officer making the application, but it doesn't preclude anyone in the world from going to the Attorney General. As a practical matter, he is not going to allow it, I suppose, except in the case of a Federal officer; but I wonder if we should tighten it up by making it clear that we are only talking about law enforcement officials. Are we talking about State? They wouldn't necessarily be concerned, but they could under this law apply, I think.

Senator BAYH. Well, there are several places we could put "by a Federal officer." I think maybe we need a subsection which says only a Federal officer can apply. Is it generally accepted that we only want a Federal officer making this application, that an individual citizen should not be granted this right? Is it permissible to ask the staff to find the proper place in the section?

Senator HATHAWAY. Maybe on page 9, subsection 2525, we could put it in line 9 there.

Senator GARN. I don't think there is harm in spelling it out wherever we can, because I think we don't want any chief of police applying.

Senator BAYH. Well, he might apply, but I doubt if the Attorney General would say yes.

Senator GARN. Just direct the staff to put it where it fits.

Senator BAYH. All right, that's a good thought, Bill.

All right, is there further discussion on the tab D amendment?

Senator GARN. I just simply say that I think it would be kind of silly to send it to the Attorney General if he had to approve, if he had no discretion, or taking away any discretionary authority from him, why go through that step? Go directly to the judge, if he can't have the discretion to turn it down. So I think it is a good amendment.

Senator BAYH. Is there objection? If not, tab D is accepted.

Shall we go vote and cogitate on tab E?

Let us go vote. Let me just say that tab E is a technical one, changing the word from "subject" to "target" which is just to make it conform to other language.

Is there objection?

Senator GARN. No objection.

Senator BAYH. If there is no objection, we will move to tab F and ask you to consider that while we are voting upstairs.

[A brief recess was taken.]

Senator BAYH. If it is all right with you gentlemen, let's proceed. We were on tab F. Tab F basically is designed to do three things.

If you will look to the bill here, starting on page 7, line 4, what we are trying to do there is to deal with the importance of minimization. I refer your attention to the last five lines of the proposed amendment because I think that pretty well sums up the previous verbiage that is really repeating definitions that are contained elsewhere in the bill, and I would just read it here if I may.

"Appropriate steps shall be taken to insure that information retained which relates solely to the conduct of foreign affairs shall not be maintained in such a manner as to permit the retrieval of such information to be reference to a citizen of the United States"—there should be a correction here, after "information" and before "reference", it should be "by" instead of "to be"—"retrieval of such information by reference to a citizen"—

Senator CASE. What does that mean?

Senator BAYH. Apparently some of the intelligence mechanisms or machines have the capacity now to punch Clifford Case's name and immediately retrieve any information that may be in their computer bank relative to what you have said.

Senator CASE. I see. That's what this—

Senator BAYH. This would cause that to be purged. In other words, if the person is an accidental participant in a conversation that is subject to surveillance as far as the immediate principal is concerned, that individual could be caught up in that, and this would deny indexing of that kind of individual.

Senator CASE. In other words, if they were checking me for murder or something, they couldn't find out that I was also engaged earlier in a conspiracy against the United States.

Senator BAYH. This relates to the gathering. One area I think we are both concerned about is where we are talking about the conduct of foreign policy, where certain kinds of intelligence activity is going on, will continue to go on for various reasons, and a number of innocent people who have no relationship to an intelligence network might be caught up in this. If they are, we want to minimize that and purge their names in a way that they won't be indexed.

Senator CASE. Well, I want to be quite sure. Does this mean that in a retrieval of the information about the foreign activity, these names will not be turned up, or does it mean that in an accidental investigation of innocent people's names, there won't be any reference to this kind of activity?

Senator BAYH. Well, there are two types of minimization in this particular amendment. One would deal with the indexing of individuals, which is the one I mentioned, punching your name and automatically the machine whirs, and out comes the volume of anything you have said any time in the last 5 or 10 years in the various kinds of intelligence. That would be verboten.

Senator CASE. That would be forbidden.

Senator BAYH. That would be forbidden.

Senator CASE. Now, would it be forbidden to keep this information in a computer in such a way that my name would come up if they investigated the activity itself?

Senator BAYH. I would suppose that could possibly be there.

Senator CASE. It isn't so clear.

Senator BAYH. No; that is really not what this is directed toward.

Senator CASE. Is there another place in the bill where that would be handled?

Senator BAYH. No, but there is another way. Since we are talking about minimization, one of the concerns we had is how we could minimize abuse of American citizens who happen to be working for foreign entities. We have included a minimization provision here, so if it is an entity that is controlled and directed by a foreign government in which there are not a substantial number of intelligence agents, KGB kinds of agents, more the commercial enterprise like Dutch Air Lines, that then the language on page 2 of this amendment would apply. In other words, this must be contained in the application requiring or asking for surveillance: "A statement of the procedures to prevent the acquisition, retention and dissemination of communications of permanent resident aliens and citizens of the United States who are not officers or executives of such entity responsible for those areas of its activities which involve foreign intelligence information."

What we are trying to do there is to keep every American citizen who happens to be employed by El Al Air Lines, for example, in the United States, or Dutch Air Lines or something like that, from being covered by this provision.

Senator CASE. That still isn't quite the matter I had in mind.

Senator BAYH. Yes, Cliff, that would be covered if it is related to foreign policy activity.

One other item in this amendment would require that if the evidence is to be used in a criminal prosecution, the consent of the Attorney General must be given, which would alert the prosecutor to the fact that you may have a wiretap problem.

Is there discussion on this amendment?

No discussion?

Senator CASE. Well, now, you can't take this whole thing——

Senator BAYH. Well, don't let me rush you.

Senator CASE. The broad question is, shall references to information that doesn't relate to a conspiracy against the United States, gathered in a tap on a foreign agency or foreign agent, in which individuals are picked up in recorded data, be physically destroyed or not?

Senator BAYH. Yes, yes.

Senator CASE. Well, where does it say that?

Senator BAYH. First of all, the application must describe the plan which the agency wants to initiate the surveillance, it must describe in detail the plan that that agency is going to use to keep American citizens from being subject to the kind of surveillance we are concerned with.

Senator CASE. That's right, but that is a question of use.

Now, the question of availability——

Senator BAYH. Now, if you look at page 7, page 7 under (5) of the bill.

Senator CASE. Minimized use and retention.

Senator BAYH. And dissemination.

One of the technical amendments is to add "and dissemination" because that is important too, to minimize dissemination.

Senator CASE. Yes, it is.

But that relates to use rather than the retention part that I am thinking about.



Senator BAYH. Well, it says retention.

Senator CASE. I know it says retention, in which we minimize the retention.

Senator BAYH. It is my understanding that the way that this works technically—and I am not an expert in this, I am beginning to become an educated novice—that it is possible if I am the target and you call, your name and that information and this is an incidental kind of thing, it isn't part of the conspiracy that we are after here, that the machine then can purge any reference to you and the information gathered from you from the records that are maintained.

Senator CASE. I would like to have the report make this very clear, that what we are talking about isn't just, you know, doing what is convenient to avoid embarrassment and that kind of thing, but the actual physical expunging from any record that is kept, as you say, minimize retention. That is kind of vague and fuzzy language, and what would satisfy one judge wouldn't satisfy another, and just to be satisfied, to feel that the procedures that are set out are good isn't quite adequate. I think we should place a very strong emphasis, if that is our intention, and I think it should be, that there be no bank of information kept about these accidental things that don't relate to foreign activity harmful and against the United States, that should not be retained.

Senator BAYH. I couldn't agree more. I think all efforts—

Senator CASE. Including the fact that it was picked up, that the name appears, in other words, you were over there.

Senator GARN. Well, there is another section on 9, line 19, "minimization procedures to be followed are reasonably designed to minimize the acquisition and retention of information relating to permanent resident aliens or citizens of the United States," and—

Senator CASE. I'm just trying to get some flesh on the word "minimization."

Senator GARN. Well, isn't it in the word "procedure"?

Senator BAYH. Well, I think this is technical procedure, and if we have good, hard language in there, we want every conceivable, reasonable effort to be made so that the incidental correspondent is purged from the system, and I understand they have the technical capacity to do that.

We thought we got about as strong a word as we could with "prevent." It wasn't "eliminate" it was "prevent."

Senator CASE. But I think it is required, if you don't mind, it would make my conscience a little easier if I have to vote for this bill in the end, to have that strongly stated in the end.

Senator BAYH. I want to say I share your concern about that.

Senator HATHAWAY. Why not write it in the bill?

Senator CASE. I wouldn't mind, but I was just thinking now about your discussions with the Attorney General. You see, we are not operating here as if we are going to write a perfect bill. That is the problem we face. We are trying to write a bill that will be accepted that can be passed over a veto or not vetoed, and that has the Attorney General's approval in substance, so we are just doing the the best we can. I think we have to put some of the stuff in the report that we might not have in the bill.

Senator BAYH. The staff advises me that the language we have used here is the language of the trade.

Senator HATHAWAY. Which one?

Senator BAYH. "Minimize." In the language of the trade it means do your best to get that out of there. I think we ought to use the layman's language in the report, to reinforce the trade language we have in the bill.

Senator GARN. But in any event, the report has to make sure that it is done regardless of the word here or there.

Senator CASE. But the question is what is done?

If we can do it in the report, I think it is the best we can do at this point.

Senator HATHAWAY. You mean there is going to be some problem if we said a statement of procedure to expunge information relating to permanent resident aliens and so forth?

What is going to be the problem?

Senator CASE. I haven't been privy to any but one of the discussions with the Attorney General, so I don't know whether it is sensitive or not.

Senator HATHAWAY. I didn't sit down with him either, on that.

Senator BAYH. Expunge means that you have got something there already. That is only half of what we are trying to do. We are trying to keep them from tapping in the first place. And in addition, in one place here we did not use the word "expunge," we used the word "minimize." I mean, I am not wed to "minimize", although that conveys the meaning of what we are after to the people in this business, but in addition to taking out what we don't want you to hear after you have heard it, we want that application to say what you are going to do in advance and do everything reasonably possible in advance to keep from hearing it in the first place.

I will accept any suggestions you might care to make.

Senator HATHAWAY. Well, maybe we should do it in two parts, minimize the acquisition and expunge the retention.

Senator BAYH. Well, in essence we have that.

Senator HATHAWAY. No. It says "minimize the acquisition and retention." There is no problem if they have got it to erase it. There may be a problem in the beginning, I understand, in trying to minimize it because you don't know what you are going to hear.

Senator BAYH. Prevent the acquisition, retention, and dissemination, prevent. Then on page 9 we have more language, "minimization procedures to be followed are reasonably designed to minimize the acquisition, retention, and dissemination."

Now, Bill, what do you think we need there?

Senator HATHAWAY. Well, there is no problem that I can see with expunging, as far as retention and dissemination are concerned. There may be a problem on minimizing acquisition because if the person can't expunge before he listens, I suppose. But if he knows it is a conversation about something that is not really tied in with this, I suppose he could turn off the tape. So that, the word "minimize" is the appropriate word in that case because he doesn't know exactly what is going to come over the earphones, or come onto them and the tape. But I wouldn't think there is any problem with respect to just getting rid of, or expunging, what is in the tape or in the record that does not relate to these objectives that we have listed.

Senator BAYH. Well, I guess we are talking about the same thing, only whether "expunge" or "prevent." If you prevent the retention, you in essence expunge, don't you?

Senator HATHAWAY. Yes.

Senator BAYH. Well, see if we can work it out. You've got "prevent retention."

Well, we have got to vote here, gentlemen. While I'm gone, why doesn't the staff work on some language of art.

[A brief recess was taken.]

Senator BAYH. May we come to order, please? I think we have some language here that if you look at page 7, paragraph (5), and page 9, paragraph (4), it is suggested that the language read as follows—

A statement of the procedures to minimize the acquisition, retention and dissemination, and require the expunging of information relating . . . .

Does that meet with your approval?

Senator HATHAWAY. That's the first problem.

Now, the second problem, with respect to the nontarget, as to whether or not the person could not have been a subject of surveillance himself but he gets on the line when they are listening. Should we not just disregard everything that person said unless it is evidence of a crime? I mean, if a person just says something about one of these things that are listed here, he might say something about the national defense, but that wouldn't mean necessarily that he should have been surveilled in the first place. It might be an innocent third party who has an opinion on our national defense or has some information about our national defense.

[Pause.]

Senator BAYH. Well, unless it is relevant to the clandestine intelligence activities our orders we just discussed preclude all that.

Senator HATHAWAY. No; they wouldn't, would they?

Senator BAYH. Well, what are we talking about then?

Senator HATHAWAY. We are talking about the situation where he talks about the Redskins football game. He is the target that would be knocked out if it is not relevant to anything that we have listed here.

Senator BAYH. If he is a nontarget he would be knocked out.

Senator HATHAWAY. If he is a nontarget and he talks about national defense, it is not a person we would put a tap on because he is not a person working for a foreign power or anything else, so why should that be on his record, that Senator Bayh said something about national defense while we were tapping on Mr. Jones.

Senator BAYH. Well, that is one of the real problems you have.

Senator HATHAWAY. Well, unless it is a crime. If it is a crime, you could use it, but other than the crime, it seems that the innocent third party should be left out altogether.

Senator BAYH. Are you referring to the entity situation or the individuals?

Senator HATHAWAY. I am talking about an individual who is not a target of a surveillance, and he says something relative to (a) through (f). He says something about national defense. Well, he could not himself have been the target of surveillance. Well, he isn't

a target. If he was, we would have to go back to get a court order to have him, too, but if he just says something on national defense or anything else on that list, it seems to me that that ought to be expunged.

[Pause.]

Senator BAYH. Well, I don't know what that does, frankly, to the capacity of the intelligence system to put together the case that is necessary to get the target, if you take out information that builds the case about what the target is doing. How can you use that information against the individual that you are concerned about? You can't index it. You can't find it if you go through on a fishing expedition.

Senator HATHAWAY. Well, if you were the target and I called you up, I suppose they would have my file. They could index it under that, and they can say that I said certain things about national defense. I'm just an innocent third party who happens to call you up if you are a target, and I just say, "Well, I understand something about our national defense," and while we are talking about it, they put that in there on a record. I am saying that that ought to be expunged unless it is evidence of a crime. I suppose we could go from there to finding out whether or not I was working for a foreign power and so forth.

Senator GARN. Well, they couldn't come back and wiretap you from that incidental conversation without going through this entire procedure.

Senator HATHAWAY. I understand that.

Senator GARN. I don't understand how you can possibly legislate, Bill, every possible situation of some identical call. I talk to people every day, or people in my office may say things to them. I don't know whether they are spies. I'm not particularly concerned. If anything incidental—

Senator HATHAWAY. Well, I'm concerned about what I happen to say to somebody over the telephone, and I think that is an understandable privilege that every American citizen ought to have, that his telephone conversations are not being recorded someplace.

Senator BAYH. Well, gentlemen, I have got to go to the floor right now. If I don't come back in 2 minutes, I will be there for half an hour.

Do you want to proceed on this and see whether we can resolve this one issue?

Senator MORGAN. I was going to say, Mr. Chairman, are we going to try to get it out before the recess, because I hear that we are coming in at 8 o'clock Monday morning and I have got the Defense bill, and I also hear there is a possibility that we might leave, and I have a little bit of a feeling that we may be moving a little bit fast. It is hard for me to integrate some of these things into the bill. Do we really want to try to get it out in 4 weeks? Do we have to under the rules? I'm not sure what the rules are.

Senator HATHAWAY. We've got 30 days, 30 legislative days.

Senator BAYH. Well, I don't want to force anybody to consider something they haven't had a chance to digest, but I don't want it to look as if we are dragging our feet either.

If you digest it over the weekend—

Senator MORGAN. I can do that. I mean, I can work on it. I am prepared to go today, but I would feel more comfortable about it.

Senator CASE. I tell you what, Mr. Chairman. Before I mention it, I would like, before we finish up, to have staff comment on the letter of the Bar Association and the extent to which the draft bill met those points. It might be we could do that kind of a thing now, if we didn't want to continue on the line-by-line markup.

Senator BAYH. I am prepared to go line-by-line and take what action the Committee might want to, and then anybody who hasn't been fully convinced of the issues could raise them at the full Committee when we have the session there.

Senator CASE. You've got an amendment, haven't you?

Senator BAYH. Why don't you see if we can resolve this question here? Do you want to try to move it on from amendment to amendment? We have a quorum now and I will get back as quickly as I can. The way this place works, I may get up and find that somebody has already got the floor.

Senator GARN. Well, Bill, I don't know whether you want to put it in the form of a motion. I frankly don't share the concern about the "incidental." We have talked about that, but it would be expunged in hearings. They are not interested in incidental conversations. If they did pick up something, then they would have to go back through this entire procedure to tap someone else. I don't know how you can cover every conceivable situation. It is so much tighter than what has been in the past, it is so much tighter than what the Judiciary bill was and I don't know what kind of language you suggest.

Senator HATHAWAY. It seems very simple for them to do it, just for them to expunge everything on target that isn't evidence of a crime.

Senator GARN. Well, whether you have the votes or not, I personally disagree with it, because you have so many situations where someone has not yet committed a crime, where this fine line is between national defense and national security and protecting the right of individual citizens. I am sure we have differences of opinion, but to totally expunge it, I think that is going too far the other direction.

Senator HATHAWAY. But this guy was not the target in the first place.

Senator GARN. I realize that, I realize that.

Senator HATHAWAY. That is like going in with a search warrant and you find evidence of a crime after you get in, that's fine, but this is saying any incidental conversation that you hear that isn't evidence of a crime—whatever it does relate to—if it isn't evidence of a crime, just to throw it out. It doesn't seem to be very difficult for them to do.

Senator GARN. Well, I'm sure that wouldn't, but what I'm saying is there may be some information that isn't evidence of a crime that would lead you to believe that you would want to go back to the procedure to try to see if this person was doing something else.

Senator HATHAWAY. Well, I am sure that is what they will do, but there won't be anything in that person's record until such time as they go back and get a warrant and then put a tap on him and then they can go ahead in accordance with the procedures that we have agreed to.

Senator CASE. I really don't see why we should save any of this information, why we shouldn't expunge it. Could I ask the staff? They have dealt with this problem.

Senator GARN. Well, we can continue to try to have unanimous agreement on everything. This is the first markup I have ever been on in my life in a year and a half where we have been so nice to each other. Why don't we have some suggested language and call a vote, and if you win, you win, and we will go on to the next section.

Senator CASE. Well, the more you stick around, the more you realize that isn't the way you make progress on a thing of this kind.

Senator GARN. Well, the Banking Committee isn't that way. We talk so long, and opinions are formed, and then you hold a vote.

Senator CASE. Well, it is one thing if you know what you are trying to do. We are not just nitpicking about words. We weren't advised to do that at all. We are just talking about concept, and I think the concept that Bill Hathaway and I are arguing for, and I think others, would be that any information that doesn't meet these things should be expunged in relation to an accidental——

Senator GARN. Cliff, I understand that, and we are talking about concepts, and we do have a difference in a philosophical point of view, so you get to the point where we have discussed it, you have expressed your opinions, I have expressed mine. I think you have the votes to do it, so rather than try and convince each other, I'm just saying in the nature of expediting it, we can——

Senator CASE. Well, this can't always be. We really can't draw the words. The thing is too tight to deal with on the basis of individual amendments that are, I think, in the final process. But I think we can take a vote, Jake, on the question of what we mean to do.

Senator GARN. That is all I am saying.

Senator CASE. Just in order to bring up the point, may I make a motion? You can ask me to withdraw it, and I will if it doesn't seem to make sense. I move that this be revised in such a way that the statute requires the expunging from any record the information picked up in the communication with an outsider that does not meet one of these five requirements.

Senator HATHAWAY. Well, I think we already agreed to that part. I'm going one step further and expunging.

Senator CASE. Well, I'm not so sure we did.

Senator HATHAWAY. Well, I don't know, I think we did.

Mr. MADIGAN. The bill substantially does that now with this amendment, with the new amendment.

Senator CASE. What is the new amendment?

Mr. MADIGAN. The amendment at tab F, the minimization procedures. The question now is whether the information should be retained only if it demonstrates evidence of a crime. We attempted to carve out a narrow area which is not necessarily evidence of a crime, but which meets one of the standards set out in this amendment.

Senator GARN. I don't disagree with you, but Bill wants to go one step further than that.

Senator CASE. Well, maybe I didn't express myself as well as I tried to before. What I meant to say, and maybe you can't say it in the statute precisely enough, I call up or you call up on the outside of one of the embassies, and this happens all the time, and you get

into these discussions in many cases—the rubric of the conduct of foreign affairs of the United States is very broad and wide ranging; it goes to the size of the foreign aid bill. Suppose the Ambassador from Turkey describes how unhappy he is about the restriction in the Foreign Aid Act and the action that we have taken to give effect to that. This kind of thing goes on all the time and it certainly relates to our foreign affairs.

Now, there is nothing particularly wrong if we keep this particular thing, but there is no reason why it should be kept.

Senator GARN. Well, Bill wants to go further and exclude it unless it is criminal.

Senator CASE. Well, I'm not quite happy with that.

Senator GARN. That goes too far for me.

Senator CASE. I am not quite happy with that.

Senator HATHAWAY. Excuse me, Mr. Chairman. What stage are we at now?

Senator GARN. We are at the stage of saying you want to go beyond that to exclude that incidental conversation unless it is criminal, probable cause for criminal.

Senator HATHAWAY. We have agreed to expunge, retention if it is not a target, you know, if it is not related to these items that are listed. I think what we ought to do is either reserve for later on in this meeting, or for the full Committee the privilege to offer some language to protect this third party. I think there are arguments that can be made. I have heard it from staff here that in some cases you might want to keep some information from a third party that wasn't necessarily evidence of a crime but might be something that we needed to have on record, and there may be some method of not being retrievable by name would suit everybody's purpose.

Senator GARN. That is my position, Bill. I don't mind making that incidental party expunge under the minimization procedure, the target or that person. My only objection is going on to that incidental. You are not making it criminal for the target. When you go into the incidental person, making it much stronger for him than for the target.

Senator HATHAWAY. Yes, but you might have situations where you might not necessarily need that third party's name, as long as the information was given over the phone, it is retrievable, but not by name. I think we need some language to protect or to circumscribe that particular situation which I think you agreed to.

Senator GARN. Yes.

Senator HATHAWAY. Well, why don't we work it out before the end of the meeting or at the full Committee so we can go on to whatever the next is.

Senator GARN. Well, do you want to approve the section as is?

Senator HATHAWAY. I want to approve it as is, with the preservation of adding what we just talked about.

Senator GARN. Well, before I turn it back to the chairman, I want to ask if there is any further discussion on tab F?

Cliff?

Bill's suggestion is that if we approve section F or tab F as is—

Senator CASE. With the expunging words in there.

Senator GARN. That he would look for language to bring to the full committee to deal with this. He is not quite certain about the criminal.

Senator CASE. I believe that is a good idea.

Senator GARN. Is there any objection to the approval of tab F?

Hearing no objection, we approve it as the amendment reads, and I turn it back to you, Mr. Chairman.

Senator CASE. Well, I thank you, and I think you have done a very good job.

Senator BAYH. All right, thank you, and I apologize for my departure. I got absolutely nothing done.

Let's turn to tab G, gentlemen. On page 7, lines 14—

Senator HATHAWAY. Page 10.

[Pause.]

Senator BAYH. What the amendment that I would propose, on page 7, strike out lines 14 through 24, strike out and insert in lieu thereof items (7) and (8), would be to shore up the reasons behind the application, to require that we have a description of the nature of the information that we are after, and also an explanation of why the certifying official reached the conclusion required by the certification section.

Under the bill, we do not have the—the judge does not have the authority to look behind the certification. This would require that this additional information be contained on the face of the application, which I think would subject the officer who ratifies and forwards to the judge the application, and makes the certification, to go through a reasoning process rather than simply to sign off as a matter of course.

Senator HATHAWAY. Yes; that's a good idea.

Senator BAYH. Is there objection to that?

Senator GARN. No objection.

Senator CASE. That is not in the stuff I have here.

Senator BAYH. It should be, Cliff.

Senator CASE. Tab G, is that it?

Senator GARN. The tough one is the certification.

Senator CASE. Well, I agree with you. I had not seen it in my book.

Senator BAYH. Now, tab G, page 10, is just conforming language to the amendment that we have just adopted, if indeed there were no objections to that amendment and we adopted it.

The substantive change which tightens up the information on the application, is on page 7, and then to make it conform, page 10 would include the language in that.

Is there objection to those two amendments? If not, we will consider them accepted.

Now, amendment H, I ask you to turn to page 11, line 24, and what this does is deal with the extension. Once the surveillance has been granted, the question is what is required before an extension can be granted and before subsequent application? What this would do would be to permit the judge who is considering the extension request to look at what had been accomplished by the original surveillance, and to make a judgment based on the kind of information, the kind of individuals involved, whether it was really a good surveillance or not before making the extension.

Is there discussion of that particular issue?

Are there objections to the amendment?

If there are none, we will consider that accepted.



Tab I deals with, on page 12, line 21, emergency provisions which would permit the Attorney General to initiate a surveillance if within 24 hours he goes through the safeguards, if it is truly an emergency situation. It seems to me that we want to make sure that he follows all the minimization safeguards that are required for nonemergency surveillances, and this would just require that the same tests be applied to an emergency request for surveillance as was required for the traditional kind of surveillance request.

Is there discussion of Tab I?

Senator CASE. Just how would it work?

Senator BAYH. Well, the Attorney General under extraordinary circumstances, in an emergency situation where he can't meet the tests, can initiate the surveillance if he does meet the tests within 24 hours. Basically I think this is sort of a technicality, this amendment, because normally a reasonable man would assume that given that kind of an emergency request, that the same procedures would be required as far as not retaining and not submitting and not acquiring information of the kind we just discussed a while ago.

Senator CASE. What we really mean here is that the Attorney General shall assume the judge's function of requiring minimization.

Senator BAYH. No, what we want to make sure of is that once the surveillance is initiated, the same minimization requirements are put on the emergency taps—which I hope would not be very many—as would be required under normal surveillance. This is really making an emergency tap conform to the same kind of protections that we already have on the other.

Senator CASE. I guess I'm thrown off a little bit by the words "minimization procedure." You see, the procedure in the earlier case is an application to a judge, and the judge is requiring certain objectives to be obtained, and what we mean here is that the Attorney General shall take whatever steps are necessary to lay out the procedures necessary to obtain minimization. In other words, he ought to be acting in substance for the judge.

Senator GARN. Well, in 24 hours, Cliff, he is going to have to go through the whole procedure anyway. He's got to approve, and then the court would take over the minimization procedures anyway. I would think it would even go further, that suppose he could not, and the tap had to immediately be pulled off, which is required, that stuff be taken care of, that he gets authorization for it, or it goes a little bit further, that suppose he couldn't justify it in 24 hours. So I think it is necessary to have it in here.

Senator BAYH. This is designed to tighten the bill.

Senator GARN. I know.

Senator CASE. Well, all I am trying to reach for is just what this means.

Senator BAYH. Well, it means that the Attorney General acts as a judge for 24 hours.

Senator CASE. Well, those are the words I was trying to put in your mouth, and I am glad to see somebody did it.

Could we have the report say that?

Senator BAYH. We will have the report specify that.

Is that all right?

Are there objections to tab I?

If not, we will consider it accepted.

Tab J, now, is an item where we have some differing opinions. It involves the use of evidence obtained in a national security tap that involves evidence to be used in a criminal prosecution. I have to say this is one of the areas that has concerned me and it still concerns me.

Are you going to present the Justice Department?

Senator MORGAN. Mr. Chairman, I have an amendment on the floor.

Senator BAYH. All right.

What we are talking about here is evidence that is gathered by a surveillance that meets the national security standard but nevertheless is used in criminal prosecution, not necessarily against the target, but it could be used against someone else. As the bill now stands, a judge could not disclose information about a tap to a criminal defendant if national security were involved, or would be harmed by the disclosure, even if the evidence were critical to the prosecution or the defense. The defendant would never be able to go behind the national security decision. The defendant and his attorney could not litigate the question of whether the tap was a legitimate national security tap in the first place.

Now, what my amendment would attempt to do would be to make clear that a judge must disclose that we are involved in a surveillance situation and that the evidence has been gathered through surveillance, if there is a reasonable question of legality of that surveillance. If, on its face, the judge can determine that there is no question of legality and that national security is involved, and if the national security isn't involved, the amendment would require that the defendant be notified. If the national security is involved, then the judge can look at the facts involved and determine whether there is a reasonable question. If there is a reasonable question, he must disclose that to the defendant, and then the defendant can litigate the question on the one hand, or the Government cannot present the evidence on the other.

I have got to say that I am not totally satisfied with that, but that just comes as close as I can to rationalizing the differing interests here.

Senator GARN. Mr. Chairman, Justice's position on this is—and I will just read the language, "disclosure presents a significant risk of harm to the national security that is nonetheless necessary in the interests of justice," the position being that this is a commonly used legal terminology that protects them, and there are positions that they feel that the other language would be harmful and make them disclose more than they would desire to, and harm their case, contacts and so on.

Senator BAYH. There is no question, I think on the simple question of whether criminal evidence should be permitted in a noncriminal tap. Justice in essence feels it should. I feel it goes further than that because it is not just a question of the evidence being submitted, but the defendant not knowing about it.

The quandary is that for justice to be served on the one hand, you hate to accidentally find out somebody is committing a crime without being able to use that evidence. On the other hand, you would like to have a system limiting the use of surveillance in such a way that anybody who acquires evidence in an illegal way knows he is not going to be able to use it. Those are the two poles.

I am not too sure I discussed it very well.

Senator GARN. Well, I think you said it yourself; it goes beyond just this point of criminal versus noncriminal.

Let me just read directly what Justice feels would be the practical effect of it rather than trying to paraphrase it.

The point the government would be put to a choice, either acceding to disclosure or dropping the prosecution and thus removing, in the interests of justice, compelling disclosure. The Bayh proposal puts the government to the same choice whenever there is a reasonable question as to the legality of the surveillance, no matter how unessential defendant's participation may be.

In practical effect, this would mean that whenever the trial judge has any reasonable doubt that, for example, the technical requirements of the statute were met, or that the minimization procedures were sufficient, the government would often be compelled simply to drop the prosecution rather than risk disclosure, and even though the trial court eventually would have resolved its doubts in the government's favor.

So they are afraid it is going to put them in a position of saying prematurely, "hey, we have got to drop this, just got to drop it."

Senator BAYH. The counterargument to that is, if the Government does what it is supposed to do, under this statute, if it meets the criteria and the protections provided here, the judge would be able to ascertain that by examination, there will not be a reasonable doubt, and thus there will be no reason to inform the defendant.

I mean, I get very concerned about someone who is being tried by evidence that is secured in an illegal way, and if indeed this whole tap is not legal, for us not even to inform the defendant of that, it is not a question of whether we use the evidence but whether he even knows about it, the normal pole would say, OK, if he doesn't know about it, you can't use the evidence. OK, I will accept that. Also, I may be more comfortable about, in the cause of justice—not with a big "J" but a little one—I am prepared to say that if there is no reasonable doubt about the validity of that evidence, of being acquired through a legally constituted surveillance, then the judge may determine in his wisdom not to inform the defendant.

What about the rest of you here?

Senator CASE. Can I ask a very naive question here?

Is section (c) on page 14 intended to apply only to litigation to which the United States is a party?

Mr. MADIGAN. That is correct, Senator, the criminal prosecutions.

Senator CASE. And more specifically, criminal prosecutions.

Senator BAYH. It could be a State court.

Mr. MADIGAN. It could be a prosecution in a State court.

Senator CASE. In any case, it is a case in which the people versus John Doe are involved, not a case between individuals.

Mr. MADIGAN. Only criminal, no civil litigation.

Senator CASE. This whole thing goes back to the court's inherent power, doesn't it, to enforce the constitutional rights of individuals against the Government, in effect, and that is what you are dealing with here, isn't it?

Senator BAYH. But we are talking about two things here, aren't we? We are talking about the right of the citizen—I mean, if we look at the citizen's part of it and say, we will talk about the right of the Government here, and I appreciate that, but we are talking about the citizen's side of it, we are talking about the right of any defendant to know the source of information that is going to be used in a criminal

prosecution, and second, we are talking about the deterrent value that says, all right, Mr. Attorney General or Mr. District Attorney, unless you follow the law, unless you follow the standards and the safeguards that we are trying to put in this bill, you are not going to be able to use the evidence.

I mean, if it gets into the gray area where at least you have to inform the defendant, you could use the evidence, as Jake pointed out, this thing could be litigated, and the reasonable doubt could be resolved on the part of the Government.

Senator GARN. Well, that is what Justice is worrying about, that it is really a premature decision to vote for single disclosure, and rather than that, they would drop the prosecution before it has been litigated and it may have been found in their favor or it may not.

Senator CASE. And when you say a criminal proceeding, you mean a proceeding for violation of Federal criminal law, either in a State or in the Federal court.

Senator BAYH. It would be a felony, a Federal or a State felony.

Senator CASE. It couldn't be a State felony.

Senator BAYH. Yes; this could be picked up in a Federal wiretap and be referred to a State prosecutor.

[Pause.]

Senator BAYH. How do you care to dispose of this, gentlemen?

Jake, do you want to put yours as a substitute to mine?

Senator GARN. Well, the only point I can put again is simply to give them the flexibility so that you are not having the premature disclosure to the detriment of the Government. So, to bring it to a head, I would simply move the substantive language on page 15, lines 10 through 11, that concludes with "it is nonetheless necessary in the interest of justice." I don't think the two are that far apart, and mine would take care of this premature disclosure but not exclude it.

Senator BAYH. I'm really concerned about the defendant not knowing this.

Senator GARN. Well, I understand that, but we're just talking about balances. I'm just talking about the balances between the two.

Senator BAYH. The balance on the other side is that the trial judge can reach the conclusion. You know, he'd have to meet your standard which, if it had been appealed, the appeals court could rule to the contrary, but since the defendant doesn't even know about it, there is no grounds for appeal.

Well, shall we just put the question?

I don't want to rush into this.

Senator CASE. We could go one step back. I suppose the Government has the alternative anyway of not prosecuting, as in the *Kaplan* case. If the Government didn't want to disclose this information, it could say no. So it might have to forgo its use in evidence.

Mr. MADIGAN. The practical effect, Senator, would be that the Government in 90 percent of the cases would not be able to prosecute the person.

Senator GARN. Would drop the prosecution. That's my point.

Senator CASE. If the case required this evidence.

Mr. MADIGAN. If the court ruled that the basis of the wiretap should be disclosed, for example, where the tap was.

Senator CASE. So the Government is not obliged to honor the order of the court. It is just prohibited from using it in evidence.

Mr. MADIGAN. That's right.

Senator CASE. There's no question about that, is there?

Senator GARN. That way they would prevent disclosure by dropping the prosecution.

Senator CASE. The Government can't require a disclosure. I mean, the court can't require the Government to disclose something that Government thinks would be harmful to the national security, or just simply does not want to prosecute.

Senator GARN. Well, unless there is further discussion we don't have a quorum now to vote on this section. We really have no alternative without a quorum.

Senator HATHAWAY. Mr. Chairman, can we pass this over until Senator Bayh comes back? I have some compromise language.

Senator GARN. Yes, we have to because we have no quorum to operate on the others also.

Senator CASE. I think it is my view that we wait until Senator Bayh's amendment is finished.

Senator HATHAWAY. We could pass on some of the other non-controversial ones, unless someone raised a point.

Senator CASE. Up to now we are in agreement, aren't we, more or less?

Mr. MADIGAN. Yes.

Senator CASE. Through tab J.

Senator GARN. Through tab J.

We could go to tab K and ask Senator Bayh's staff to explain.

Actually the next one is very short. On page 18, lines 21 to 22, strike out "a reasonable time thereafter, transmit to the" and insert in lieu thereof the following: "Seventy-two hours of the initiation of such surveillance, transmit to the Select Committee on Intelligence of the U.S. Senate and the."

It is a very simple amendment.

I suggest it is simply requiring a specified time rather than saying immediately after.

Senator CASE. How did you come up with this? Was it Justice?

Mr. CONNAUGHTON. Justice was not adverse to this and the Committee suggestion.

Mr. MADIGAN. This strengthens the disclaimer which was in the previous bill by the addition of the words on page 18, line 10.

Senator GARN. I would certainly have no objection to putting a certain time. Really that's all we're doing.

Bill, do you have any objection?

Senator HATHAWAY. No.

Mr. CONNAUGHTON. In addition, it adds the words, "subject to the determination of the court," deemed to affect the exercise of any constitutional power the President may have, subject to the determination of the court. That is making clear that that is something in the courts and we are not passing on it.

Senator HATHAWAY. Where are we now, tab L?

Mr. CONNAUGHTON. On tab K.

Senator CASE. We have approved K.

Senator GARN. If there is no objection, we can approve tab K and move on to tab L.

Would you like to summarize tab L?

Mr. CONNAUGHTON. Tab L is purely a technical amendment to conform to criminal sanction sections in Title III, which is the criminal wiretapping statute, with those of this chapter. Unintentionally, I presume, the Judiciary Committee had not made it clear that it was a crime for someone in the Government to violate the provisions of our foreign intelligence wiretap statute. This makes it clear that it would be criminal to violate this bill if it is enacted into law.

Senator GARN. Is there any discussion on this amendment?

Senator CASE. Well, let me soak it up.

Senator GARN. All right.

Mr. CONNAUGHTON. This is one of the ones suggested by the New York City Bar letter.

Senator CASE. OK.

Senator GARN. Is there any objection to tab L?

Senator HATHAWAY. No.

Senator GARN. Then we will consider tab L approved and move on to tab M, which is a technical amendment that I wish to propose. On page 21, lines 6 and 7, strike out, "but in no event shall exceed 90 days, and on page 21, line 12, strike the period and insert in lieu thereof "; and (3) that the test may exceed 90 days only with the prior approval of the Attorney General."

The reason for this technical amendment is simply that there can be some occasion when the determination as to the capability of equipment that is being used in the surveillance would simply take longer than 90 days to approve. It strengthens the safeguards in that it would require approval of the Attorney General for any such periods beyond 90 days for this testing purpose, and also, that all material that was produced as a result of the surveillance by testing would have to be destroyed at the end of the test period, so although that does extend the 90-day period only at the specific approval of the Attorney General, and any information gained during that test period would simply have to be destroyed. It is not a matter of minimization. It simply says "will be destroyed."

Senator HATHAWAY. No problem with it.

Senator GARN. It is simply testing to make sure that it works. It doesn't matter in this case whether it is criminal, noncriminal or anything else. It has got to be destroyed when the testing period is over with.

Senator CASE. There isn't any desirability of putting some outside time limit?

Senator GARN. Beyond the 90 days?

Well, I'm sure it would be interpreted that it couldn't go beyond another 90 days.

[Pause.]

Senator CASE. I wonder if we could just check to see if we did want to put an absolute limit. I think we might do that.

Senator GARN. I would have no objection to check that out and find what additional time they may need, but I would assume that it wouldn't go beyond an additional 90-day period without being approved again.

Senator CASE. As it stands now, it looks like it could be an open-ended operation.

Senator GARN. Well, I would have no objection; but talking to technical people, with that reservation of checking that particular part, is there any objection to approving tab M?

If not, we will consider tab M approved, and that puts us back to Senator Bayh's amendment.

Senator HATHAWAY. Well, I have an amendment that goes on page 22, Mr. Chairman. Mike will give you copies.

I believe the bill, as amended, is a substantial improvement over the one that was reported out by the Judiciary Committee which contained vague and unspecific language that might have permitted surveillance of constitutionally protected activities which are engaged in by many Americans. I think that through our efforts, that problem has been rectified.

The bill, as amended, would limit wiretapping of American citizens to only the most serious cases of foreign-directed espionage, sabotage, and terrorism. And it would require that in those cases the courts must first approve.

But we in the Congress will have a role to play as well. If the documented litany of intelligence abuses of the past have taught us anything, it is the need for continued vigilance to insure that our Government stays within the law. The new Senate Committee on Intelligence, and this subcommittee, have been charged with a special responsibility to exercise that vigilance.

I am not unmindful of the fact that the past record of the Congress in overseeing our Nation's intelligence activities is far from good. I would like to see built into this law a requirement that this Committee devote special attention to the operation of this particular law. My amendment would require that the Intelligence Committee examine, and within 12 months report on the implementation of this new statute, how the bill is being interpreted and applied; and whether it should be amended or repealed.

The 1-year report should include an analysis and assessment of whether or not other laws already on the books, such as the 1968 wiretap law for crimes, are sufficient to afford adequate protection against the situations involved. And, the report should contain a determination as to whether appropriate amendment of the criminal espionage laws would have accorded the same degree of protection.

Finally, if it is the judgment of the Committee at the end of a year that the law should be permitted to continue, I would require, through this amendment, that this Committee issue a report every year on the same subject.

Mr. Chairman, I would like to formally offer my amendment at this time.

The amendment, if I can read, just says that "On or before October 1, 1977, and on the first day of October of each year thereafter, the Select Committee on Intelligence of the United States Senate shall report to the Senate concerning the implementation of this chapter. Said reports shall include but not be limited to an analysis and recommendations concerning whether this chapter should be (1) amended, (2) repealed, or (3) permitted to continue in effect without amendment."

It seems to me, as I mentioned at the beginning, that this is sort of experimental in nature. We have had some previous evidence to indicate that this type of surveillance activity has been abused, that

we ought to have some mandate upon us to check it out periodically so that the Senate will be kept up to date as to just how it is operating, and we can make whatever changes are necessary.

Senator CASE. This would be in lieu of a fixed term.

Senator HATHAWAY. It would be a fixed term.

Senator CASE. It would be in lieu of a fixed term.

Mr. CONNAUGHTON. I think Senator Bayh wants to talk about a fixed term.

Senator CASE. It really would tie into that. It would affect your judgment about that.

Senator GARN. I was just going to say I consider this a much better alternative to a fixed term. I have a lot of objections to a fixed term, and I won't state them now, with Senator Bayh not here, not having proposed it. I think there are some difficulties in that, and it would make a great deal more sense to me with your amendment. It is really an oversight amendment to take a look and say, "this is new and we want to see how it works, and it has worked well in this area, and it has not," we make reports, we make recommendations to change and modify or amend. That makes a great deal more sense to me than just in 2 years say the whole thing collapses because right off the bat, you've got an entirely different Congress. Who is going to be here, what attitudes are there, and do we want to have it just lapse and have no bill? And go back to the old system.

I frankly don't understand wanting to put a limitation on it, and there is a very good possibility—you know how many times we get down to deadlines—something has to be extended, and so you frantically extend it, or you let it go, and usually you frantically extend it without any change.

It seems to me this is much more substantive, taking a look at what is going on and trying to improve it as it goes along rather than having a specific end.

Senator CASE. I think that approach makes a lot of sense. We could refine it by adding a provision for compulsory action by the Senate and the House on such recommendations, to avoid filibuster possibilities which could prevent action on any changes or anything like that.

Senator HATHAWAY. Yes, just as they have in the budget law. Yes, I would be happy to accept something like that.

Senator CASE. I would like to suggest something like that, and I mentioned to Senator Bayh that this is as good of an approach as his.

Senator HATHAWAY. Shall we wait for Senator Bayh to come back before we act on this one?

Senator GARN. Yes; I think we would need to because we need to get his feelings on the 2-year limitation, and without a quorum, any action we take could not be—

Senator CASE. Could I ask the staff now, or whenever we finish discussing, where we can, to go through that letter and comment on it?

Senator GARN. Well, I see no reason why we can't do it now with the staff at hand, while we are waiting for Senator Bayh to come back.

We'll use a cooperative effort here, and when the staff members who are familiar with the paragraphs—

Mr. CONNAUGHTON. Well, let me start, if I might.

On page 2, the second full paragraph expresses concern about "engaged in clandestine activities." We think the amendments meet



that by saying that such activities must involve criminal violations, and we also put criminal standards on terrorist and sabotage activities in the amendments that we passed on earlier today.

As I read their paragraph 1, they seem to say, as the bill was amended from the original Judiciary Committee bill, they read this as neutral, it isn't an improvement, but simply, it is meant to be neutral, the disclaimer section in the present bill, the disclaimer section that we passed on earlier today.

Senator CASE. What have we done now?

Mr. CONNAUGHTON. What we have done is add words that—

Mr. MADIGAN. This would be tab K.

Mr. CONNAUGHTON. This would be on tab K. So that the bill would read "Nothing contained in Chapter 119"—

Senator CASE. Excuse me, that isn't—

Mr. CONNAUGHTON. Well, I am reading from the bill. What it does to the bill is makes it clear on page 18, line 10—

[Pause.]

Senator CASE. Well, tell me; what do you think? Was this letter written before the judiciary amendments?

Mr. CONNAUGHTON. No; I think they had the judiciary amendments in mind, but they say they were happy with the improvements here. They make it clear that Congress doesn't recognize, and it is certainly the intent, I know, of Senator Bayh and I'm sure most of the members of this Committee, that this is neutral language.

Mr. MAXWELL. It was dated July 1.

Senator CASE. May I just informally present my understanding of this thing? This is intended first of all not to affect the existence, or create anything that doesn't exist or take away anything that does, and so it says that nothing shall affect the exercise of any constitutional power, inherent constitutional power if the acquisition doesn't come within the definition of electronic surveillance.

Now, I suppose this is the thing I wanted to ask you all along. What happens if it does?

Mr. CONNAUGHTON. What we are saying is that nothing in this affects powers the President may have in those two sections, (a) and (b). It does affect powers he may have in every other instance, so it is limiting this inherent constitutional power and not recognizing them in any case, preempting in all cases except perhaps in these one or two really, (a) or (b) where they may or may not exist.

Dealing with this disclaimer is extremely confusing, but I think this is neutral.

Senator CASE. Well, this is something that I never did understand, and if I do, it runs away from me right away. In other words, what we are saying—let me paraphrase it and see if I understand it. Nothing shall be deemed to affect the President's inherent constitutional power in the case of acquisition; not within electronic surveillance and/or in the case of circumstances that are unprecedented and unusually harmful. This doesn't affect his inherent power in those two cases. That is what we are saying.

Mr. CONNAUGHTON. Any power he has.

Senator CASE. Could we say it a little bit more clearly then?

Mr. MADIGAN. Senator, the paragraph is meant to say, and I think does say, if there is inherent power, it is limited to the circumstances described in subparagraph (a) and subparagraph (b) and this language—

Senator CASE. Now, could I paraphrase it another way? This bill is intended to affect the exercise of any power by the President unless it falls within these two cases.

Mr. CONNAUGHTON. That is correct.

Mr. MADIGAN. It is intended to require the procedures set out in the bill except for these two cases, and these two cases are intended to allow the court to determine whether the President has the power.

Senator CASE. Where does that come in?

Mr. MADIGAN. That is the reason for the addition of the words "subject to determination by the courts."

Mr. EPSTEIN. Tab K.

Senator CASE. Well, I don't mind leaving it in, or not having it in the bill, just as long as we clearly understand and have it in the court, because this is pretty elliptical language, because when you stick it in—although I understand the purpose now—because when you stick it in about the court that makes it even more elliptical.

I hope you didn't think I am nitpicking, but this isn't very clear.

Mr. MADIGAN. This provision has caused more controversy and more discussion than any other provision in the bill, and it came down to a decision on the part of the subcommittee as to whether to eliminate the entire provision or to add the language.

Senator CASE. Well, I should think we can, even in the case of inherent power, regulate procedure as we can, and in addition to that he can't wiretap except in these two cases.

Mr. MADIGAN. Unless he does it under the provisions of the bill, in other words, through the warrant procedure.

Senator CASE. And that he doesn't have to follow procedures.

Mr. MADIGAN. In these two cases he doesn't, if he has the power.

Mr. CONNAUGHTON. Senator Bayh's position is going to be that he doesn't have it in those two cases.

Mr. MADIGAN. The Supreme Court has not ruled on those two cases.

Senator CASE. I know, and I don't want to give it any help.

Mr. MADIGAN. That is the import of the State bar, that is, not to recognize it—

Senator GARN. I know so little about the inherent powers of the President that I wouldn't know whether you are nitpicking or not.

Senator CASE. Well, the President doesn't have any inherent power but sometimes he has to break the law. Now, I have put myself in the same vulnerable spot that Mr. Nixon did. I think that is the best way to leave it and not try to institutionalize it.

Senator GARN. Well, that was the whole intent. I do understand that was to be neutral and let the court make the determination, and not lean one way or another.

Mr. MADIGAN. The argument against taking out a provision like this is that if you don't narrow it to (a) and (b) then that area of possible permissible power is undefined and perhaps greater than (a) or (b).

Senator CASE. Well, I got a couple of flashes when Kennedy was explaining this to the committee, but the flashes have been fewer and farther between and less blindingly bright since then. Unless the President—the President can wiretap, if the court says he has got the power, he can, without following the procedures. One is if it is not an electronic surveillance, and I assume that can be followed out clearly, and then the second case is if the facts and circumstances are

so unusual that they cannot reasonably be said to have been within the contemplation of Congress. I can't think of anything.

Mr. MADIGAN. That is designed to be the true emergency, the nuclear war or some other situation. In other words, the amendment requires if the power is exercised under subsection (b), that within 72 hours of the exercise, the President notifies Congress.

Senator CASE. Well, I'm glad you said that, because that was my next question. One of the things I was going to say, was that in all cases where there had been powers exercised, power in the bill, he ought to tell us, and that is the law, whether we have got it in there or not. He can't do something that is in his inherent power and not tell us about it.

Mr. MADIGAN. That is correct.

Senator GARN. I would suggest that we recess for 10 minutes.

Senator CASE. Could we have a possibility of some report language explaining this, including our last point about reporting?

I'm not sure that Justice Department would accept that unless we have it on the record.

Senator GARN. The subcommittee will stand in recess until the completion of the current rollcall vote.

[A brief recess was taken.]

Senator BAYH. We have tentatively agreed on the matter of what standards should be applied in the use of criminal evidence collected in a wiretap in a national security surveillance.

To take the language that I had in my amendment, that if there is a reasonable question as to the legality of the surveillance, or that such disclosure will not be harmful to the national security, and add to that language which has been prepared by the Justice Department and Messrs. Halpern and others, provide that when the Government certifies that no information acquired by electronic surveillance has been used in the preparation of the prosecution, the judge shall, unless the interest of justice requires an adversary hearing, *ex parte* and *in camera*, determine either that the surveillance was lawful or that the Government certification is correct, and if he so finds, then no information need be made available to the defendant.

Now, we might be able to tighten up on that language between now and the full Committee hearing.

What we are after here is the kind of a situation where 10 years ago an individual happened to call someone who was the target of a surveillance. He is an incidental party, and 10 years later he commits a totally unrelated crime, and I frankly don't feel we want to have a standard that would permit him to use a tap 10 years ago to exonerate him from a totally uncommitted crime in which there was no surveillance.

Now, does that make sense here?

Senator HATHAWAY. Yes.

Senator BAYH. Is there general acceptance of that?

And maybe advise the staff that, with all respect to the authors—that maybe everybody can—

Senator CASE. They can put it into English.

Senator BAYH. Strike out a few commas and *ex parte* and *in camera*s, although I think the one *ex parte* and *in camera* is necessary?

Is there objection to that?

Is that OK with you?

Senator GARN. Yes.

Senator BAYH. Fine. Now, we are keeping tabs on everything. Where are we here?

Senator GARN. That I think takes care of it except for Mr. Hathaway's amendment.

Senator BAYH. Well, did we agree to the 72-hour disclaimer?

Senator HATHAWAY. Yes.

Senator BAYH. Well, if I would just stay out of here, everything would get solved.

We agreed to M?

Senator HATHAWAY. We finished all the tabs I think.

Senator BAYH. Well, we're down to tab—well, it's the 2-year limit.

Well, what do you propose?

Senator HATHAWAY. Mine, I think you have a copy of it, Mr. Chairman, is a periodic review every year, starting the first of October 1977, by this Committee, and report to the Senate on whether the chapter ought to be amended, repealed or permitted to continue in effect without amendment. In effect, this would mean that the law goes on forever, but we would be mandated to review it once a year and make a definite report, and we couldn't just say, well, we looked at it.

We would have to make a report that we looked at it, held hearings and so forth, and we found that the law is working out fine and doesn't need to be amended, or reports amendments, or we could even report that it ought to be repealed. In other words, we have to do it. It seems to me that would be better than having a determinable date where you might not get any modification on it whatsoever, and we go back to the laws which exist today which of course we are trying to correct by having this chapter enacted in the first place.

Senator BAYH. The only concern I have about that is if we could hook it up with some language like Cliff was mentioning.

Senator HATHAWAY. Yes; I mentioned to Cliff that we should have some procedure whereby it can't have a filibuster and be defeated.

Senator GARN. Well, I have no personal opposition, because as I told Senator Bayh upstairs, I think we all know there are certain people who like filibusters and that kind of a provision now might cause opposition. They say, look, if a year from now something comes up that I don't like that is being proposed by your Committee and I can't talk about it forever, I'm going to talk about it forever now. I just throw that out. That is not my opinion. I have no objection to putting in Cliff's language. I just don't know whether we cause problems for the bill now.

Senator CASE. I don't believe we would, Jake. We didn't run into that—

Senator HATHAWAY. On the budget, on the other one.

Senator GARN. Well, as I say, on the subcommittee, I have no objection.

Senator CASE. It would seem to put use to it, and reasonably so.

Senator BAYH. So what we are in essence saying is that we would take this language and then require that there be an expedited procedure by which the recommendations of the Committee would be acted upon one way or the other in a specified period of time.

Senator HATHAWAY. Yes.

Senator BAYH. That's all right with me. What I was concerned about was the 180° turn that, you know, Jake brings this up now, but this could also hurt us two years from now where there are those who could filibuster any recommendations we could make on reflection.

Senator CASE. Well, I think it is absolutely right. They have discovered how to get around filibusters anyway—I mean get around cloture legislation anyway. But this is a little different.

Senator GARN. I have no objection if we can direct the staff to come up with specific—

Senator HATHAWAY. Language along the line we have in the budget law.

Senator GARN. And add that to your amendment.

Senator BAYH. All right, I withdraw my amendment and we go with Senator Hathaway's as amended by staff.

Senator GARN. As amended by Senator Case, and put out by staff, to be precise. We have enough problems with Senators.

Senator BAYH. Are there objections to that amendment, wherever it may be.

All right, we will all have a chance to take a look at this to make sure we are doing what we want to have done when we get to full Committee.

If there are no objections, it is approved.

Do I hear a recommendation?

Senator HATHAWAY. I move that we report it to the full Committee.

Senator BAYH. Second?

Senator GARN. I second it.

Senator BAYH. No objections.

All right, thank you, Senators, thank you, staff, and we also thank the interested parties here who spent an awful lot of time on this.

Senator CASE. I think we have met most of the things that are spoken of in this letter one way or another. The question of damages they raise, I don't think we have referred to, and I'm not sure that we should.

Senator BAYH. Before we leave, why don't we do what Senator Case said.

Senator CASE. We started before, but on this question of damages, it is correct, we don't deal with that at all. We don't exclude it.

[Whereupon, at 4:55 p.m., the subcommittee recessed, subject to the call of the Chair.]

TUESDAY, AUGUST 10, 1976

U.S. SENATE,  
SELECT COMMITTEE ON INTELLIGENCE,  
*Washington, D.C.*

The Committee met, pursuant to notice, at 10:16 a.m., in room 2228; Dirksen Senate Office Building, Hon. Daniel K. Inouye (chairman) presiding.

Present: Senators Inouye, Bayh, Stevenson, Hathaway, Huddleston, Morgan, Hart of Colorado, Baker, Case, Thurmond, Stafford, and Garn.

Also present: William G. Miller, Staff Director; Howard Liebengood, Assistant Staff Director; and Michael Madigan, Minority Counsel.

The CHAIRMAN. The Committee on Intelligence will please come to order.

On June 15, 1976, the Judiciary Committee reported S. 3197, the Foreign Intelligence Surveillance Act of 1976. The bill was referred to the Intelligence Committee, and subsequently to the Subcommittee on Intelligence and the Rights of Americans which held hearings on June 29 and July 1.

On Friday, August 6, the subcommittee voted a favorable report on the bill, with amendments. A copy of the bill, as amended, has been circularized.

If this bill is reported favorably today, I will be inclined to keep this measure open for further consideration during the recess. I know that we all are not here at this meeting, but I plan to report this measure to the full Senate at the conclusion of the first business day after the recess.

I would now like to recognize the chairman of the subcommittee, Senator Bayh.

Senator BAYH. Thank you, Mr. Chairman and members of the Committee. The subcommittee and its staff has been involved since this matter was given to us in some rather lengthy and at times tense negotiation with the Justice Department. I think it is fair to say that for many of us, if not all of us, the question presented was a very grave and delicate one in which we were trying to balance the sacred rights of citizens of this country on one side versus the rights of the country as a whole, to be protected from those who would embark on certain kinds of activity which would result in doing great danger to the national security of the country.

Speaking only for this one Senator, but I think probably conveying the feeling of several members of the Committee, we are not, at least I am not 100 percent satisfied with a few items in this bill.

I do believe it is the best bill that we are going to get, and that a bill like this puts us in a better position than we are presently. With all respect to those who in good conscience and dedication to individual rights and civil liberties say that the changes that have been made in this bill were cosmetic, I must say it is certainly a different kind of

cosmetics than I have ever been involved in. I think there were significant changes, significant safeguards added compared to the bill as it was passed out of the Judiciary Committee.

May I suggest, Mr. Chairman, perhaps the most expeditious way to accomplish the mission before us is to go over the committee print of the bill and to give the Committee members the general assessment of the individual changes, and then the Committee can act on its will relative to accepting the changes made by the subcommittee or not. Of course, everyone is free to make individual changes that were not encompassed in the subcommittee action. If there is no objection to that, let me suggest that we proceed.

Senator GARN, as vice chairman of the subcommittee, do you have anything you'd like to say?

Senator GARN. Thank you, Mr. Chairman. I am pleased to be able to support the subcommittee's amendments to S. 3197.

In reporting out this bill the subcommittee has, I feel, considerably tightened the definitions of possible targets of electronic surveillance. Indeed, throughout our lengthy negotiations in this matter, there has been give and take between the subcommittee and the Attorney General. In fact, in my opinion, the Attorney General has bent over backward to try and accommodate the concerns that many have about categories of potential targets of surveillance which are broad enough to include hypothetical abuses. I, too, am concerned about the permissible area of electronic surveillance being broad enough to include hypothetical cases which all would agree are abuses.

However, I feel it is equally important that these categories of permissible electronic surveillance be broad enough to include legitimate and necessary espionage cases, where the employment of electronic surveillance is vital to the protection of this country. I think we must all remember that this bill delineates the limits of all electronic surveillance in the foreign intelligence espionage field. We must draft the categories of permissible areas of electronic surveillance broadly enough to include examples of espionage which all agree should be covered. The subcommittee discussed many such areas of necessary electronic surveillance in its closed session deliberations.

In effect, this bill carves out a narrow area of knowing conduct on the part of resident aliens and American citizens, which involves covert collection of information at the direction of an intelligence network. It is my firm belief that any person who engages in that conduct, whether he be an American citizen or not, is legitimately and validly the subject of electronic surveillance. This bill permits such surveillance.

I do not agree that we should give our adversaries a blank check to employ American citizens in the espionage field. We need to protect the rights of our citizens but we do not need to overprotect their rights and allow an American citizen to knowingly and voluntarily be involved in the collection of information for a foreign intelligence network and to do so with impunity. To suggest that Americans be free from all electronic surveillance despite their involvement in foreign intelligence to me is not a wise course to take.

Therefore, I am going to vote in favor of the amendments of the subcommittee to S. 3197 and hope that this bill will receive rapid and favorable action in the Senate.

Senator BAYH. Thank you.

Everybody here has the Committee print, which in essence contains the subcommittee report, the bill as reported out by the subcommittee. I would like to apologize to the members of the Committee that because of the time frame and the apparent printing problems which confront us at this time in this session, we were not able to get you a completely reprinted, cleanly prepared bill. You will find certain words that have been penned in. So I think it is easy to convey the intentions of the subcommittee. But it is not in a boilerplate, printed fashion as we would normally like to present to you.

May I ask that we go to page 2 of the bill, which has been stricken over to page 4. Let me ask you to turn to page 4.

This basically deals with definitions. One of the major concerns was that certain terminology had no strict definition, and we were trying to catch some rather big fish, and using a rather fine net. And I think what we have done here, just to outline the specific changes, is to significantly tighten the language so that we narrow the target that can be subjected to electronic surveillance.

I might ask that you look at page 5 and go quickly through some of the significant definitions.

First we define a foreign agent. To be a foreign agent you have to knowingly engage in terrorist activities, sabotage activities; and conspire, aid or abet those who are knowingly engaged in such activities. And particularly I would like to call your attention to "D", which defines a foreign agent as a person who knowingly engages in clandestine intelligence activities, which violates the criminal statutes of the United States.

I think we have tightened that up to the point where we are now talking about the violation of criminal law in those sections.

The CHAIRMAN. Mr. Chairman.

Senator BAYH. Yes.

The CHAIRMAN. Can we, as you progress, ask questions?

Senator BAYH. You sure may.

The CHAIRMAN. On page 4, on the definition of foreign power, subsection C, a foreign power means an entity which is directed and controlled by a foreign government or governments. Would this include, for example, the Jewish National Fund?

Senator BAYH. I don't think the Jewish National Fund is directed or controlled by a foreign government or governments.

The CHAIRMAN. What about Bonds for Israel?

Senator BAYH. What section C is designed to get at is a commercial entity which is controlled or directed by a foreign government or governments, and as you will see as we go along, we have expressed special concern that Americans who happen to work for such a foreign entity are treated in a special way. That is what that is designed for.

Senator MORGAN. I believe we designed, Mr. Chairman, if I am correct, that it would include Japan Air Lines, British Overseas Air Ways, et cetera, that kind of commercial enterprise.

Senator BAYH. That's accurate, that's accurate.

I think it is pertinent that you should note that to be included. You must be controlled by the government, the whole government, but the problem there is raised, as we point out later on in another section of the bill, of what happens when you have a commercial



enterprise controlled by a foreign government which employs a substantial number of American citizens. We have given particular attention to that, but I have to say very frankly that that is one area that I am concerned with. I think we have done about as well as we can here.

I don't want to leave the impression that just because you are a foreign entity that you are automatically tapped or subject to being tapped, subject to surveillance under this statute. You have to not only be a foreign entity, but engage in—well, the entity must be engaged in an activity which information can be beneficial to the defined purposes in the subsections as far as the national security and foreign policy of the United States. You just don't automatically qualify to be subject to surveillance because you are a foreign entity.

Any further question on that matter?

Now, "E" on page 6 is the Committee's effort to try to deal with what I think is probably the most sensitive and most disconcerting feature of this bill. I have to confess to you I'm not totally satisfied with this. I am prepared to support this language. I think it has been a significant improvement, but in the categories briefly touched on before, we are talking about violation of criminal statutes before one can be subject to surveillance. Here we are talking about a lesser standard, and that concerns me. My concern has been relieved to the point that I support this language because of the specific activities and information which must be intertwined before an individual may be subject to surveillance, and let me just emphasize the important parts.

This person must be acting pursuant to the direction of an intelligence service, must knowingly transmit information or material in a manner intended to conceal the nature or the fact of transmission, and this must be done in such a way that it would lead a reasonable man to believe that the information or material will be used to harm the security of the United States, or that lack of knowledge by the Government of the United States of such transmission will harm the security of the United States.

In other words, we are for the first time in this bill making it possible for the judge to make the determination as to whether this person could be reasonably assumed to be involved in collecting this kind of information in a way that would be harmful to the security of the United States.

We are talking about a spy here. We are not talking about a volunteer. This is someone who must be acting pursuant to the direction of an intelligence service, not someone who walks into the Israeli Embassy or some other embassy and says "I just got back from a trip, would you like to know this?" or "I think you should know this." We are talking about someone who is being directed by a foreign power and is involved in the sort of activity which would harm the security of the United States.

The CHAIRMAN. By information, that information need not be classified; is that correct?

Senator BAYH. That's correct. The problem here is that in certain select cases, where all the other criteria is met, the probable cause case can be made that you have got a spy here, not just a normal citizen, but somebody who is on the payroll of another government, and he

has been doing things in a clandestine manner, making all these various kinds of contacts in a surreptitious way, but because of the nature of the transfer of the information, it is impossible to know what kind of information is involved. Then we give it to the judge to determine whether it can be reasonably assumed that the information transferred will be harmful to the security of the United States.

It is a tough question, frankly. I think this is one of those areas where I had reservations, but I think really it is necessary to this particular kind of thing, in certain instances, to protect the security of the country, and I think we have required here and elsewhere in the bill certain other safeguards which would protect the citizen from unwarranted surveillance.

And I alert you gentlemen that this is a controversial section that you will hear about if you haven't already.

The CHAIRMAN. I think it should be noted that if the information had been further restricted to mean classified information, we would be subject to the whims of those who are classifying information; isn't that correct?

Senator BAYH. That is accurate. It would also mean that in fact classified information could be in the process of being transferred but because you didn't know what kind of information it was, there was no way you could prove it was classified information.

The CHAIRMAN. Therefore it has been shown time and again that classified information could be newspaper clippings.

Senator BAYH. Yes; but a judge has to decide, and the reasonable man test would lead one to believe that whatever is being transferred—well, first of all, the reason I was able to come to grips with this—normally I couldn't make this exception to the criminal standard. Here you have to be able to prove the probable cause. We are talking about a spy, someone under the control and direction of a foreign power. Now, on the other end of it, you have to be able to prove, at least to the judge's satisfaction, that the way an agent is acting, and the access of certain kinds of information that may be available to him would lead a reasonable man to believe that this would be harmful to the national security of the United States, and for that reason I was able to reconcile this in my own mind.

Senator MORGAN. Birch, I'm still wrestling, but if you are talking about a spy, you are normally talking about a criminal or someone who is about to commit a criminal act.

Senator BAYH. Well, that is a problem. You are talking about a spy who may be involved in all sorts of clandestine activities, clandestine meetings, secret signals and the dark of the night operations, but due to the very manner in which he is operating, you are unable to nail down the kind of information. I mean, if you know it is a spy, or if it is an individual citizen, and you know that he has plans for a secret weapons system, then you have no question. You can nail him under another section, because that is a crime. But the loophole is here because you don't know the kind of information that he is passing.

Senator MORGAN. But if it is information or material that would be used or could be used to harm the security of the United States, aren't we getting pretty close to the criminal law barrier between a crime—

Senator BAYH. We are getting very close, but technically and

honestly we haven't gotten over it, and I can see why you are concerned, and I am concerned.

I would like to emphasize here—and I am certainly not an intelligence expert, and won't be, don't particularly want to be—but the fact is that in many instances we do not know what kind of information is being transferred. We have the tie of the individual to the foreign power. We know the kind of clandestine acts he is involved in. But the missing link is knowing the kind of information being passed. And the fact that history has proven that apparently there is a long period of time in which information is not necessarily criminal in nature as far as the classification of documents is first passed, and then at the 11th hour when the flare goes up, the national security information is passed. I mean all these kinds of things at times could be national security information, but you don't know it.

Are there any further questions on (E) there?

The CHAIRMAN. Senator Hart?

Senator HART of Colorado. Mr. Chairman, reluctantly and with the indulgence of Senator Bayh, I would like to lay down an amendment out of order for later consideration by the Committee at the time that you arrive at it because Senator Baker, who is cosponsoring it, had to leave, and I am going to have to immediately. It will occur, for members' reference, on page 18 at the end of section 2527, as a new subsection (b), and I will just mention what it is and hope that others—

Senator CASE. Gary, are you talking about the new galley?

Senator HART of Colorado. Yes.

Page 18, just before the beginning of section 2528, there would be a new subsection (b) on section 2527. This simply reads as follows:

Nothing in this chapter shall be deemed to limit the authority of the Select Committee on Intelligence of the U.S. Senate to obtain such information as it may need to carry out its duties pursuant to Senate Resolution 400, 94th Congress, agreed to May 19, 1976.

The purpose of the amendment is to clarify that this Committee under its Senate resolution mandate has the authority to obtain wiretap information other than just the names of those being tapped, and I think it is crucial, and Senator Baker feels also that it is crucial, in carrying out our duties of oversight of electronic surveillance activities by Government agencies, to have the sentence clarifying that authority in this legislation.

I think it is important for us not only to carry out our duties, but for us to help to try to insure that the civil liberties and civil rights of this country are protected. That is the purpose of the amendment, and unfortunately I can't stay to argue it, and it not timely to take it up now in light of the fact that we are moving section by section. But I just wanted to get it on the table because Senator Baker, the principal sponsor, is not here, and I have to leave, and I am a cosponsor.

Senator THURMOND. Mr. Chairman.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. If you could just give me 10 minutes before I go to Armed Services.

The CHAIRMAN. Well, just a minute. Are you finished?

Senator HART of Colorado. Well, I misstated myself. I said information on wiretapping other than the names. I meant information on

wiretap activities other than their mere statistics. I think the bill, as I think it now reads, or as our mandate now reads, might be construed to mean that all that the FBI and other agencies have to report to us are the number of taps. What this amendment does is to clarify that those agencies also have to tell us the purpose of the taps, and offer some substance and justification for the taps that are ongoing, automatically, as part of their report.

The CHAIRMAN. Would you like to have discussion on this before you leave?

Senator HART of Colorado. Well, I don't want to interrupt any further.

Senator BAYH. I am prepared to recommend that the Committee accept this. In the amendments that I recommended to the subcommittee originally was the stronger language which would mandate a reporting. This is the real concern of the Justice Department, for reasons, Mr. Chairman, that I don't think should be mentioned here, but for that reason, I agreed to drop the specific requirements, with the understanding that this is going to happen anyhow. And I think the language that is presented by Senator Hart and Senator Baker, as I read it here for the first time, deals with this matter much more delicately and does not give rise to the questions that were raised by the Justice Department. In fact, I understand that the Justice Department this morning has agreed to this, where they were violently opposed to the specific "thou shall report." I think your approach here in no way damages the authority that we have under Resolution 400, and is a much more sensitive way of dealing with it.

Senator HART of Colorado. Well, I appreciate the Senator's remark. The point is that section 2527, as it presently reads, requires the Attorney General to report to us annually, in four statistical categories: number of applications for taps, periods of time during which those taps would be in place, number in place at any time during the preceding year, and number terminated.

Well, those are all statistics, and I don't think that they provide this Committee with the kind of indepth understanding of the purpose of those taps and their scope and the reason for their continuance that our Senate resolution requires us to look into, and therefore our section (b) stipulates that that reporting requirement shall not be deemed to limit our authority to obtain additional wiretap information. That is the purpose.

Senator GARN. Mr. Chairman?

The CHAIRMAN. Senator Garn?

Senator GARN. I would certainly, as vice chairman of the subcommittee, support this. I think this is a good amendment, and Senator Bayh has outlined some of the things we talked about earlier, which I felt were too strong. I think this handles the problem adequately from both sides, and I would certainly recommend that the full Committee approve it.

The CHAIRMAN. Is there any objection?

Senator THURMOND. Mr. Chairman?

The CHAIRMAN. Yes, sir.

Senator THURMOND. I have no objection to this, and if I could just take a minute and a half, I have got to go.

The CHAIRMAN. Well, can we vote on this if there is no objection?

Senator THURMOND. OK.

The CHAIRMAN. Well, if there is no objection, out of order the amendment is accepted.

Senator Thurmond.

Senator THURMOND. Mr. Chairman, I believe this bill which authorizes application for covert use of electronic surveillance to obtain foreign intelligence information is a bill which the American people and the President and the Committee can accept. The President clearly has the duty to protect the national security of this Nation. It is not clear under the Constitution how far Congress can go to prescribe by statute the standards and procedures by which the President is engaged in foreign intelligence surveillances and the sanctity of national security.

I believe the bill as reported by the Judiciary Committee is properly within the authority of Congress, although as we all know, Congress cannot decide the constitutional question. The courts will do that.

However, I might mention that section 2526, as it came from the Judiciary Committee, might be preferable. I understand the Justice Department would probably favor that on the admission of evidence, and would appear to be more of a judicial matter than an intelligence matter. It does not seem to me we should try to extend the provisions of this bill now. I want to see what effect this bill will have before we consider going further.

Should we go too far in trying to tell the President how to do his job in this area, we could clearly be in the position of eroding the basic rights of all Americans. The balance between individual rights and national security is a delicate one, and let us see if the scales balance with the bill we have.

Thank you very much.

The CHAIRMAN. Thank you, Senator Thurmond.

Senator Bayh.

Senator BAYH. Now, back on page 6, when you get to (3), terrorist activities, sabotage activities. I might emphasize here we have tightened that down so we are talking about criminal acts.

(5) Foreign intelligence information, what that means. We have tightened that up, perhaps not as far as some people might like. The catch phrase there is (B)(ii), the conduct of the foreign affairs of the United States, but where we have tightened it down is we have required that the tap is designed to get information which relates to and is essential to the kinds of national security problems or foreign affairs information. In other words, the addition of that language would make it impossible, at least legally, to put a tap on someone's bedroom, an agent's bedroom, to find out what his or her personal activities were tonight, in an effort to try to blackmail them or something else. This information must be related to and deemed necessary for the United States to protect itself, et cetera, et cetera, essential to the national defense or the security of the Nation or the conduct of foreign affairs.

Here again, particularly the foreign affairs clause there is not as specific as I would like it, but I think we have nailed it down much tighter than it was before.

On page 8 there is a rather technical thing under (C) there where not only the installation but the use. We have added "or use" which

means you don't have to install it. You can sit out in a car or another building and beam certain electronic waves at a room or windowpane and thus collect for use electronic, mechanical surveillance without installing. It is a technical amendment to take into consideration certain sophisticated devices which don't technically need installation.

On page 9, the top of the page there, it is really the same as the old bill, down to section 2523. Now, from there over to section 2524 on page 11, what we did were the following things. This deals with judges, how they should be chosen.

The bill, as reported from the Judiciary Committee, does not require that the appointment of either the first panel or the appeal panel be made publicly. We require that it be made publicly. Second, the Judiciary bill permits what has commonly been called judge shopping, which would permit the Government to go first to one judge, and if that judge turned them down, to go to a second, third, fourth, fifth, down to the seventh judge. We would prohibit that, saying the Government may choose the judge but if that judge turns down the request, then it immediately goes to appeal.

We also require that a record be transmitted from the personal file kept or made by the first judge as to the reason why a request had been turned down, so that then it will go to the appeal panel. So that the appeal court will know the reason why the first application was turned down, that was not required in the original bill.

That basically gets us over to page 11, gentlemen, unless you have any question on that.

There at 2524, we have added, at the request of Senator Hathaway the specific wording which this subsequently in the bill would require that this application must be made by a Federal officer, that a citizen cannot initiate this request for surveillance.

Also, in this section, we gave the Attorney General discretion to turn down as well as to accept the request.

Now, I suppose a reasonable man would assume that he had that discretion, but it could have been argued that in the first instance, the way the language from the Judiciary Committee was before that the Attorney General had no alternative but to accept the request from another agency. We give the Attorney General here the discretion to turn down as well as to accept.

We add here and elsewhere in the bill, or rather we substitute the word "target" for "subject." Apparently in the parlance of the intelligence trade, "target" is the more definitive word and the more restrictive word.

On page 12, in order to resolve the concern expressed by the Senator from Maine in our subcommittee markup, we added language which would require expunging as well as deal with acquisition, retention and dissemination as far as the minimization procedures are concerned.

This area deals with requiring that the Government do everything it can too, and we used the words, deal with the "acquisition, retention, and dissemination, and to require the expunging" of information relating to individuals where they really aren't designed to be the target of the surveillance.

Here later on in that same section, in an effort to tie it down, we specifically enumerate those categories of individuals that—or let me put it this way: We specifically enumerate the categories of information which are subject to surveillance by information which will

protect itself, the Government against actual or potential attack, et cetera, et cetera. Here again this is to tighten it up so they can't go on a fishing expedition.

Over on page 13 we deal with the surveillance that is under the foreign policy information and prohibit the practice which is called indexing, in which it is possible now, apparently, under certain kinds of sophisticated electronic equipment, to punch a button and the name of Birch Bayh will come up at any time he might have been caught making a telephone call.

What we would require is that this indexing procedure not be made available if indeed the surveillance is designed to cover the requirement of gathering foreign policy information.

The CHAIRMAN. Senator Bayh, I'm sorry to interrupt, but just for the record, the record will show that a quorum has been present, and the bill will be reported subject to amendments.

Please proceed.

Senator CASE. Mr. Chairman, before I was able to get here because I had to be at the Foreign Relations Committee, and I'm sorry I wasn't here at the beginning, you did make some statement of your intention with respect to the actual report of the bill?

The CHAIRMAN. This bill will be kept open for consideration during the recess and will be reported to the Senate at the close of the first business day after the recess.

Senator CASE. Does that mean that we will have a meeting on that first business day to make final, to give final direction?

The CHAIRMAN. If it is the desire of the Committee.

Senator CASE. I think it would be best to have that understood. I think that it shouldn't be left open for consideration unless we meet for final consideration.

Senator BAYH. Well, I think, if I might interrupt, in discussing this meeting, that everybody ought to have a chance to study it perhaps more thoroughly than the members who were not privy to the subcommittee actions, and even some who were, and then if changes were desired we could meet, and if changes were not desired and there is no request made for further amendments, then the measure could just be passed on out.

Senator CASE. Well, either way is perfectly satisfactory with me, just so long as we all understand what is necessary.

Now, if we follow your suggestion, Birch, we will not have to meet unless a member of the Committee or other member, I guess, of the Senate, has asked that we consider, or meet to consider a particular matter.

Senator BAYH. It was not my request. I was simply taking liberties.

Senator CASE. Well, I was just suggesting you were interpreting it. Is that the thought, Mr. Chairman?

The CHAIRMAN. If the request is made by any member of this Committee to hold special meetings to consider an amendment, it will be done, but I am glad you brought that up, Bob.

For further clarification, the Chair would like to instruct the membership that that request for a special meeting must be received by the chairman or the vice chairman before 12 noon on that day. I would hate to receive it 5 minutes before adjournment.

Senator CASE. I think you are quite justified in that, and I would suggest that the staff be directed to notify all members of the Committee of the direction that you have just given.

Senator BAYH. Let me invite your attention to page 13, subsection (6)(e). Now, we are talking about minimization efforts, in other words, efforts that are used to protect the rights of citizens who are not really designed to be the target of surveillance in the area of entity that the chairman brought up earlier. In other words, you have a foreign entity or an entity that is controlled and directed by a foreign government. Basically we are talking about commercial enterprises here. We are talking specifically here about a commercial enterprise that does not have a substantial number of foreign intelligence agents as part of it. If it has, it is an obvious front for foreign intelligence gathering, then it is not subject to this, but if it is a normal kind of commercial enterprise, foreign commercial enterprise which has substantial numbers of American citizens working for it, then frankly many of us were deeply concerned.

Here is another area that I'm not 100-percent satisfied with, but I think we have come a long way here toward protecting the rights of American citizens that just happened to be innocent bystanders that have a job working for a foreign commercial enterprise, and I just read this so that everybody will be aware of it:

A statement of the procedures—

in other words, this is in the application, there must be—

A statement of the procedures to prevent the acquisition, retention, and dissemination, and to require the expunging of communications of permanent resident aliens and citizens of the United States who are not officers or executives of such entity responsible for those areas of its activities which involve foreign intelligence information.

This means that in advance you have to say to the judge what steps you are going to take to keep from affecting secretaries and just normal employees of a normal commercial enterprise when you are talking about the subject of surveillance.

(7) There deals with certification as well, and what we are trying to do here and what we do do is require that in the certification that is made as an application is made, we are talking about the kind of information that is sought. We could not reach an agreement that would permit the judge to go behind the certification, but we did require that on the face of the application and the certification, the nature of the information sought must be specified, the facts, the reasons that it is indeed foreign intelligence information.

What we are trying to do here is insure that in the certification, the application and the judicial proceedings, as much as humanly possible, we take away the automatic rote response that automatically there is an application, certification and judicial agreement, that this has to be thought out, and we get around the boilerplate approach of a rote response.

The CHAIRMAN. Will the chairman yield?

Senator BAYH. Yes, certainly.

The CHAIRMAN. In determining the information, I don't suppose the bill would limit this information to just foreign policy or military and defense, would it? It also covers industrial secrets?

Senator BAYH. Yes; but those industrial secrets have to be either essential to the foreign policy of the country or relate to the national security.

The CHAIRMAN. And the judge would decide that.

Senator BAYH. No, no. If we are talking about the foreign policy section, the Attorney General may certify on the face of the appli-



cation that the information meets the prescription here in the bill, but in addition to just saying certain kinds of information, we also require evidence to show that there had been a thought process here, and it specifies here that the information sought is foreign intelligence information for the purpose of surveillance that does contain foreign intelligence information. It requires a factual description of the nature of the information sought, that the information cannot easily be obtained by normal investigative techniques, and it designates the type of foreign intelligence information being sought.

In other words, I would like, frankly, for us to have gone beyond the certification and not only have to prove the probable cause we are talking about, the spy, for example, but we are talking about information that a reasonable man would judge, using the reasonable man test, making a probable cause case that the information is there.

Now, we couldn't get Justice to go along with that, and I am prepared to accept this with the safeguards that have been written here, that as near as humanly possible, we should show that there is a thought process involved here.

The CHAIRMAN. In order to establish some legislative record, may I cite a hypothetical case? If the British Overseas Airway Corp., which is British owned, learns of an industrial process discovered by an American industrialist to convert coal to gasoline very inexpensively, and should decide to, under strange circumstances, spying or otherwise, acquire that information, would that be subject to a tap?

Senator BAYH. Technically I think it would.

The CHAIRMAN. It would?

Senator BAYH. I think the case, using that specific point, would make poor law, as the chairman knows, but inasmuch as this country is involved in significant negotiations with other industrialized nations, petroleum importing nations, and these nations are then in turn involved in negotiations with the OPEC nations, this is a fundamental part of our foreign policy; I think knowing that other governments had access to information and were prepared to use this information in a way that might be detrimental to our negotiating process, that you could make a case that this would come under the foreign policy provisions of the bill.

Now, I might stand corrected, but—

Senator CASE. Mr. Chairman, I would think that that might be right because further, we are committed under the terms of agreements that we have made with Western countries and consumer countries, to share oil, and generally foreign policy I think is very deeply involved in that sort of information.

Senator BAYH. Well, of course, this is a sensitive area. It is one, as I said earlier, that I am not totally satisfied with, but let me say, the safeguards involved here go to minimization, so that everybody who works for a given British company who happens to be an American citizen, who is not involved with access and transmission of this information or developing a policy of its transmission or its acquisition—and what we are requiring here in subsection (e), that I pointed to earlier, would require really the agency designing the plan to subject this foreign entity to surveillance to target its surveillance on telephones within that commercial establishment, that are being used by the policymakers and not just tap everybody in the building.

The CHAIRMAN. All right, thank you very much.

Senator BAYH. All right, then, I think we can go over to page 8; the bottom of the page, that is pretty well the old bill, on down to "Issuance of an order" there, 2525 on page 9, and really, gentlemen, all of the changes there are "made by a Federal officer," and "to require the expunging," are designed to make this following section and sections conform with the application we have already discussed.

Over to page 12.

[Pause.]

Senator BAYH. On 12, the only significant change there, or item to be brought to your attention, is in the event that there is a request for an extension, we would require the judge to do more than rely on the information contained in the original application. We would require the judge also to look at the information that had been gathered as a result of the original surveillance, and then to make a new finding as to whether the information gathered during the surveillance would lead the judge to believe that an extension was reasonable and not just bound by the facts contained in the original application.

On page 11, what we deal with there basically is to subject the Attorney General to the same safeguards of minimization in the event of an emergency—page 13, excuse me—would require the same standards of minimization to be followed by the Attorney General in the event of an emergency surveillance, as would be required under normal surveillance.

In the bill we do give the Attorney General the authority to act for no more than 24 hours, really, as a judge, in the event of an emergency, and the bill as reported out of the Judiciary Committee did not require the information gathered during that 24-hour period before the normal judicial standards are required, that that information be subject to the safeguards of minimization. We certainly would want that, and so we wrote that in there.

Senator CASE. Mr. Chairman.

Senator BAYH. Yes.

Senator CASE. I don't want to be thrashing old straw again.

Senator BAYH. Thrash away.

Senator CASE. But we discussed this a little bit recently, that is to say, what the responsibility of the Attorney General is, in connection with the emergency employment of electronic surveillance, and with respect to minimization procedures. Minimization procedures are the procedures required by the judge, and if there is no judge, there is no judicial application to a judge, who decides what degree of minimization in these particular respects will be required and should not a specific finding by the Attorney General as to the necessity for minimization and steps be taken to minimize be required? This is not just a matter of procedure.

Senator BAYH. Well, what we are doing here—now, that's a good point—what we are doing here is in that 24 hours subjecting the Attorney General to the same test and giving him the same responsibilities that would normally rest on the shoulders of the judge, and he would have to—the language there on page 13 would make the Attorney General conform to the same action, the same standards as we are imposing on judicial determination elsewhere in the bill. Instead of enumerating all that again, we just require that he meet that same standard.

Senator CASE. I understand. The word "procedures" perhaps is the word that bothered me here. These aren't just procedures. These are specific actions to be taken to minimize, and only the judge can decide what those are, but once they are established, they are not procedures anymore. They are steps required to be taken, and I think you and I don't disagree on the substance of this at all. It is just a matter of making it clear that the Attorney General has got to follow the decisions that the judge is required to make in the case of the application.

Senator BAYH. May I ask my friend just to read the last part of the sentence there, where we used the words you just used. In other words, we are not only talking about procedures, but "to be followed." In other words, we are talking about procedures that have been required by this chapter for the issuance of a judicial order be followed.

Now, if you are easier with other words, then I am prepared to do anything that will accomplish the same thing. What other word could we use?

Senator CASE. I would say something like this in sort of plain English. "He shall, in place of the judge, establish what procedures shall be taken in order to accomplish these results." That is all I mean to say.

Senator BAYH. "He shall as elsewhere in this chapter described for the judge." "He shall, in lieu of the judge, require?"

Senator CASE. Whatever. Again, the worst way, I suppose, in the world is to try and write definitive language in a general discussion of this.

Well, put it this way. May I be entitled, in conference with the staff, to try and work out some language which I think makes this a little clearer, either for the report or for the bill itself?

Senator BAYH. I have no objection to that if no other members of the committee do.

I think what we are trying to do—

Senator CASE. And to put it in colloquial language, what we are requiring the Attorney General to do is to do what the judges have to do over here in the way of establishing substantive requirements to minimize.

Senator BAYH. Well, let's look at it, all of us, and maybe the Senator from New Jersey, after study, will come to the conclusion that need not be done, but let's talk about that language, either here or in the report.

Senator CASE. Well, indeed I may, but I just want to be clear that this is our objective.

Senator BAYH. This is our objective, and I think absent relating the Attorney General's decision to the judicial function, we are, other than that, saying everything that the Senator from New Jersey mentions. Perhaps we could insert that or at least in the report be very clear that what we are doing is asking the Attorney General for 24 hours to serve as a judge. Maybe that is the way it can be put.

Why don't you look at it, and if you have suggestions, let's—

Senator CASE. Well, it isn't a question of just how long the surveillance continues. Minimization procedures deal perhaps most importantly with the product, whether it be obtained in an hour or in 2 or 3 days, or in a longer period of surveillance.

Senator BAYH. Well, it was the concern that you are expressing with the language of the original bill that caused us to suggest this particular language. There is no question that we are not differing as to purpose. The difference maybe is whether the language described here accomplishes the purpose.

Can we ask that you think about that, and that if there is other language that makes you rest easier, and reasonable enough that we can accept it—the Senator from New Jersey is seldom, if ever, unreasonable.

Senator GARN. Birch, it would appear to me, I don't know how you can tighten up the legislative language any more than it has been. Understand Cliff, I understand exactly what you are trying to accomplish, and I don't agree or disagree, but I think the language is specific enough, and in the report language you might just amplify it, that you know he is going to act, for the 24 hours, the way the judge does, because I think when we change that for the issuance of a judicial order to be followed, I think that can be clarified in the report language easier than we could try to find more words.

The CHAIRMAN. If you want to be a bit more firm, may I suggest a change. "If the Attorney General authorizes such emergency employment of electronic surveillance, the minimization procedures required by this chapter for the issuance of a judicial order shall be followed." No ifs or buts about it.

Senator BAYH. I have one suggestion made by staff here, "If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the same minimization procedures as are required by this chapter for the issuance of a judicial order be followed during the period of time before the application for a judicial order is issued or denied."

Senator CASE. Thanks very much. I appreciate your concern for easy rest. And I personally want to thank you all for it. Just let me think about it, if I may, and try to work out something. All the suggestions, I think, are very good, and it may be that the language in the report alone will be satisfactory.

The CHAIRMAN. I believe it appears that all of us are of one mind, and Jake's language about the committee language clarifies this.

Senator CASE. I would just say this, and stop for now. My emphasis on this point is that what we are doing is asking in effect the fox to guard the chicken yard here, and we want to make very clear that he has the responsibility affirmatively to do that.

Senator BAYH. Why don't you study that, Cliff, and if you can come up with language that will do the job better, I am certainly glad to put it in the report.

On over on the next page, 14, section 2526 talks about use of information. It is really conforming changes.

On page 15, now, we are dealing with what I think is a very important feature of this bill, and that is, what do we do if there is information gathered from the kind of surveillance that we are dealing with here that is to be utilized as criminal evidence?

Well, what we have done here is first of all require that the Government notify the court of the source of the information, and that the court determines that the surveillance was authorized and conducted in a manner that did not violate any right afforded by the Constitution, and thus, the local prosecutor would be made aware of the fact that you have a wiretap with a possible problem here, and the question is—this is a matter of real concern that some of us had in the original bill, where this decision of the existence of the tap, and whether the disclosure was made by the judge in his chambers *ex parte*, *in camera*, *in camera*, *ex parte*, without the defendant even knowing about it under certain circumstances, and what we have required here is that there

shall be disclosure to the defendant if there is a reasonable question involved as to the legality of the surveillance, or that disclosure would not harm the national security, with one proviso, and I will just read this here:

That when the Government certifies that no information acquired by electronic surveillance has been used in the preparation of a prosecution, the judge shall, unless the interests of justice require an adversary hearing, *ex parte* and *in camera*, determine whether the surveillance was lawful or that the Government's certification is correct, and if he so finds, then no information need be made available to the defendant.

Now, what we are after here, gentlemen, is——

Senator HUDDLESTON. Would the chairman yield?

What page?

Senator BAYH. We are talking about 15 and the top of 16.

What we are after here is the Watergate example of James McCord, where once he knew that he was in trouble, he called a couple of embassies that he knew were subject to or had reason to believe were subject to surveillance, so that then he could go to the court and have his Watergate prosecution thrown out because he was an incidental participant in a surveillance on a couple of embassies.

For example, if someone is now being prosecuted on independent evidence for heroin traffic, I don't think we want that person to be able to plead he may have been swept up in a surveillance 10 years before on something totally unrelated; the evidence from which is not being used in the current prosecution.

So that is what we are after. And frankly, I think we have established a pretty good test here. In other words, if there is a reasonable question as to the legality of the surveillance, where such disclosure would not harm the national security, then the judge has to make this information of the surveillance available, unless it is one of those totally unrelated taps, and the present trial is not derived from any information gathered from one of those totally unrelated taps.

Now, I might suggest we go to page 18 and——

The CHAIRMAN. Before proceeding, may I suggest that we have a short recess. There is a vote going on now.

Senator BAYH. All right.

[A brief recess was taken.]

The CHAIRMAN. Senator Bayh?

Senator BAYH. Gentlemen, we are now at 18, where the Baker-Hart or Hart-Baker amendment was to be added prior to section 2528.

The CHAIRMAN. That has been accepted.

Senator BAYH. That has been accepted by the Committee.

I feel, upon reflection, the same way about that amendment as I did in my initial comment about it.

Section 2528, here again, was a tough one and I suppose a controversial one, going to the Presidential disclaimer. The effort has been all along to have this bill assume a posture of neutrality as far as the Presidential power to participate in this and to have a neutral position between the branches who have power to do what.

I think frankly we have strengthened this by adding the only thing we have added to this particular section: We added one other item. We added "subject to determination by the courts" which gives a very strong interpretation, in my judgment, that the President cannot arbitrarily determine that he has this power, that we all

recognize that the jury is still out on this. We are not going to decide on it on the Hill. He is not going to decide on it down at 1600 Pennsylvania Avenue, but this inherent power, or absence thereof, is subject to the determination by the courts.

Also, we added, on page 19, the black print, the 72-hour provision which there is in this section authority given to the President, the Attorney General, in the event of circumstances which were not reasonably contemplated by Congress, we have given authority to act quickly for the national security of the country.

The CHAIRMAN. May I interrupt at this point?

Section 2528, this section states that the President has specific constitutional powers to acquire foreign intelligence information by means of electronic, mechanical or other surveillance devices.

Does the President have constitutional authority to conduct surveillance, or does this power come from legislation?

Senator BAYH. That is a question that has not been resolved, and that is the reason for us putting in "subject to determination by the courts," and we say nothing contained in this shall be deemed to affect the exercise of any constitutional power the President may have, subject to determination by the courts, to acquire foreign intelligence, et cetera.

The CHAIRMAN. Is it necessary to put in that word "constitutional"?

Senator BAYH. Well, if he has any powers, they are constitutional. If he doesn't, they are unconstitutional, and can be prescribed by statute or limited by statute, and I think that I should perhaps amend what I said earlier before as far as the 72-hour provision for powers which the President may have to act in the areas not contemplated by Congress. I don't want this to be interpreted as giving him any powers he may not now have. I believe he has less powers than they claim now. I can't decide that. We collectively can't decide that. It is going to be decided by the Supreme Court.

What we are trying to do here is to find language acceptable both to the legislative branch and to the executive branch as far as neutrality is concerned.

The CHAIRMAN. Am I correct to interpret from that statement that as far as the chairman of the subcommittee is concerned, he is not certain whether the President does have or does not have constitutional power to acquire intelligence through electronic devices?

Senator BAYH. That is accurate. I have not significant legal expertise on that.

The CHAIRMAN. Was that the view of the subcommittee?

Senator BAYH. That was the view of the subcommittee.

The CHAIRMAN. Thank you.

Senator BAYH. I think regardless of how, when you look at this, it has been tightened to first emphasize that these powers or the absence of these powers is going to be determined by the courts, and not either by the President or the Congress, and second, in the event that may be determined that the President does have these powers and he utilizes those powers to deal with the situation which is not contemplated by our subcommittee or Committee or Congress collectively, that we are requiring that within 72 hours of the initiation of that particular kind of noncontemplated surveillance, that this Committee receive a report relative to that surveillance as well as the two Judiciary Committees.

The CHAIRMAN. Can you give some example of what you mean by section (b), or "facts and circumstances giving rise to the acquisition are so unprecedented and potentially harmful"?

Senator BAYH. No, Mr. Chairman, I can't. If I could think of it, the facts, it would be contemplated.

And I think we have covered everything that we could reasonably expect to occur. This was such a significant matter to the Attorney General, he cited one example that occurred in the last couple of weeks that he had not anticipated which was brought to his attention, and in which, incidentally, surveillance was denied.

I guess what we are saying is we are living in a crazy, mixed up world and we can't foresee every circumstance. We cannot foresee what the genius of man might contrive, either to protect himself or destroy himself, and for that reason, we are willing to give that discretion to the President, if indeed he does have power to do it at all, with the understanding that even in the most dramatic or the least significant instance of this noncontemplation, that he had better truck up here in 72 hours and let us know about it, and I think the very fact that that reporting within 72 hours is required will minimize the temptation to utilize it.

The answer to your question . . . is no.

Senator CASE. Mr. Chairman, is it the intention of this bill not to have a report of the nature you were just talking about in the event the President orders surveillance to which (a) is applicable?

The CHAIRMAN. Either (a) or (b), if applicable, a special report must be submitted to the Senate.

Senator BAYH. Well, (a) deals with matters beyond the purview of this bill, frankly, that we are going to be dealing with later on, although we have not attempted to limit or prescribe. That will be covered by charters or charter, one of the charters as is prepared by the ad hoc committee that I think the Senator from Kentucky—I don't want to play games, but I think the Senator from New Jersey knows what we are talking about, and probably everybody in the hearing room knows what we are talking about, but I don't think anything can be gained by putting it on the record.

Senator CASE. Well, the answer is it is not intended to apply to (a).

Senator BAYH. That is right, very frankly, because in (a) we are not talking about something that isn't contemplated.

Are there any further questions on that?

On page 20, 21, 22 they are technical and conforming amendments to make the bill consistent with where we are now and what we have already discussed.

On 23, starting with section 5, on through the last page, page 24, this was suggested by the Senator from Maine, who is not here. He can explain it more than I. As chairman of the subcommittee, I was recommending that we have a 2-year limitation on the entire measure that would force us to examine what we had begun and how it was working. The subcommittee felt that the suggestion by the Senator from Maine was better than the 2-year limitation.

What is suggested in section 5 is that we have an ongoing study; and that the first report by the Committee on how this measure that we were discussing, how it would work, would be rendered as of March 1, 1978, and subsequently, on each March 1 thereafter there be

a subsequent report, and in the event the study that has been made and reported by the Committee concludes that certain procedures need to be changed, recommendations for those changes will be made, and in order to prevent a few individuals either in this House or the other House from thwarting the recommendations of the subcommittee study, we have included here the implementation procedures, the expedited implementation procedures of the War Powers Act, which would mandate that action in both houses be taken. We can't mandate affirmative action, but this would prohibit this Committee from studying the implementation of this act, coming to the conclusion that there were certain grievous errors being committed, making recommendations which would be acceptable to a majority of both Houses of Congress, but because of certain pressures that were brought to bear, a handful of our colleagues could take advantage of the parliamentary procedures that are theirs to prevent the Senate and the House from even having an opportunity to vote upon the measures that were recommended by the Committee.

We have one last technical amendment. We have just come up with that overnight which is really, it is a technical amendment which would make the provisions of this act conform to Title 18. There is nothing substantive there. It would just make it conform to Title 18 and Title 18 conform to it.

We are talking about Title 3 and Title 18.

Now, gentleman, I don't think there needs to be a long and laborious discussion on this. I think just to give us a point of reference—

The CHAIRMAN. We have before us S. 3197, as amended by the Subcommittee on Intelligence and the Rights of Americans, and explained to us by the subcommittee chairman, Senator Bayh.

Any further discussion or reflection?

Senator Morgan?

Senator MORGAN. Mr. Chairman, if no one else has any comment, I would first of all congratulate the chairman of the subcommittee for his efforts and laborious work in trying to make this an acceptable bill under the most trying circumstances. I think everyone recognizes the fact that we have only had this bill less than 30 days, and during that 30 days we must have had 125 or 150 rollcall votes on the tax bill and it was almost impossible to carry on any kind of meaningful dialog, but nevertheless, I think he has done a tremendous job.

I had some reservations about the bill in the beginning, and I still have some reservations about it. We have seen, Mr. Chairman, over the period of the last 2 years or so abuses of our democratic process by our intelligence agencies and by our elected officials, and many times these activities were in violation of the law, but many times, and quite often, their explanation for their extralegal activities were that what they were doing was necessary for national security, despite the fact that in my opinion what they were doing was illegal. In other words, our laws were inadequate.

So in response, what we really are doing now is expanding the laws to cover the alleged needs of the intelligence community. We only know that we want the intelligence agencies to continue to provide us with the maximum security from our enemies, but I am not sure that we have given enough thought to the methods that they should use. In legitimizing intelligence activities, we are doing away with what I



believe was the long-evolved standard of probable cause of criminal activities with investigations of Americans that Harlan Stone laid down for the Federal Bureau of Investigation so vividly and so clearly in 1924. And as I have listened to literally months of testimony of the activities of these agencies and considered the desirability of changing that rule, I am not yet convinced that Justice Stone's decision then isn't just as valid now as it was then.

I do want to say, Mr. Chairman, that the bill as it has been amended by this Committee is a much, much better bill than it was when it was referred to the Committee by the Judiciary, and it may be that later on I might be able to accept it, maybe, with some modifications that study during the recess might enable me to come up with, but it is by no means perfect.

In my mind, we won't be able to enact a perfect bill certainly until we have had a comprehensive study of the intelligence area. We don't have any idea of what kind of standards would be used by our own intelligence agencies in beginning an investigation. We have little idea of when physical surveillance with respect to spies would begin. We have no idea when informants should be used. And accordingly, we haven't even considered the charter, the proposed charter.

There were two things that the Church Committee came up with which I agreed with, and of course, my mind is always open to change, but so far it hasn't been changed, and that is that Americans should not be subject to surveillance in the absence of a reason to believe that they have committed a crime, or are about to commit a crime or have just committed a crime. And we also in the Church Committee report, if I recall correctly, concluded that the President had no inherent power under the national security clause to violate the law.

Now, that was two findings, and yet in this bill I realize we have a rather neutral disclaimer at the end of the bill which I had moved to strike or had intended to move to strike. I will not at this time because of lack of study. I understand that there are those who insist on this provision being in the bill, if we have a bill at all, not necessarily on this Committee, and this disturbed me because it must mean something, or else they wouldn't be so persistent in it.

I know as a lawyer, having practiced law in all of the courts of the land, from State to Federal, for many years, that if I wanted to argue that the President did have this inherent power, I would certainly cite this neutral disclaimer as an evidence that the Congress thought it had so, or else it would not include it in there, and I read the testimony of Mr. Nixon in which he said that if the President did things—that the President could do things which, if done by other citizens, were illegal. I really don't, I honestly don't believe that in order to protect this Nation that we have to do those things.

And I know one of the former FBI agents in Greensborough last week said, "I'm paranoid, but if I am paranoid about freedom, the freedom of the individual in this country is so big, if I could carry on just a short dialog with Birch, I think I could illustrate one of my concerns."

As I understand it, in order to get the search warrant, or the authorization in this case, Senator Bayh, the investigative agency first makes the determination that the American citizen is an agent of a foreign power as we have defined it in the bill. Is that not correct?

Senator BAYH. That is correct.

Senator MORGAN. Now, what this bill does is provide that in addition to the fact that a citizen who is not involved in a criminal activity is an agent of a foreign power, is that a certification needs to be filed. In other words, once they determine that he is an agent of a foreign power, a certification has to be made before an authorization can be made. Is that not correct?

Senator BAYH. Correct; the probable cause burden is placed on proving that one is an agent of a foreign power acting under the direction and control of a foreign power, very similar to the probable cause that has to be made under the test mentioned by the Senator from North Carolina, that a person is about to commit a crime.

Senator MORGAN. And that certification is made by the executive branch of the Government. Is that not true?

Senator BAYH. That is accurate.

Senator MORGAN. Now, that certification is to be made by the Attorney General. Is that not correct?

Senator BAYH. That is accurate, or his designee.

Senator MORGAN. Then, Mr. Chairman, if my memory serves me correctly, in the testimony that we heard publicly in the Church Committee, there were some allegations that Martin Luther King was in effect an agent of a foreign power, or working in collusion with the Communists, or aiding and abetting the Communists. If my memory serves me correctly, two different Attorneys General of the United States approved a surveillance, an electronic surveillance, on Martin Luther King, Attorney General Kennedy and Attorney General Katzenbach.

Senator BAYH. I must say—and I don't want to interrupt your train of thought here—I think that I am familiar with the circumstances relative to Martin Luther King, and that tap could not have been made if the Attorney General had had to meet the tests of this bill.

Senator MORGAN. I grant you it may not, but they were authorized at a time when clearly in my mind it was illegal, so if they did authorize it under any circumstances, if they certified this to the judge, this would be a certification to the judge, would that not be correct? In other words, this would be—the certification would be required, and the Attorney General, the same officer who permitted surveillance of King, would be the certifying officer here.

Senator BAYH. Well, let me make a distinction here. As I said earlier, I shared the concern of the Senator from North Carolina on this matter.

I have been able to rest more easily with it than he has because the business of requiring an application is divided into two components, the certification of the kind of information—and we have put in certain safeguards, Senator, in which that certification has to be on the face of the application, and I don't want to go into it again unless you want to—that determination is made by the Attorney General, and the judge cannot go behind that; but the second part of that is that the question of whether that person about to be surveilled or subject to surveillance is an agent or not is not made unilaterally by the Attorney General. It is made by the judge. He can look behind that, and the probable cause case has to be made that the person is an agent.

Senator MORGAN. Well, the Senator almost made my case for me because as I understand, I am satisfied that Attorney General Kennedy and Attorney General Katzenbach, based upon information supplied to them, thought that their surveillance was justified.

Senator BAYH. That's not enough, Senator.

Senator MORGAN. I know it isn't, but now, suppose they make the certification, as I read from page 39 of the Judiciary Committee's report—as I understand, the language has not been changed—here is what it has to say:

"Paragraph (5)"—I believe it would be (8) now:

Requires a finding that a certification that the information sought is foreign intelligence information, that the purpose of the surveillance is to obtain such information and the information cannot feasibly be obtained by normal investigative techniques has been made pursuant to Section 2524(a)(5). If the certification procedures in section 2524(a)(5) have been complied with the court is not permitted to substitute its judgment for that of the executive branch official.

So if those certifications are made to the judge, then he has got to issue the authorization.

Senator BAYH. You are correct insofar as the type of information is concerned, and that concerns this Senator just as it concerns the Senator from North Carolina.

I would like for the judge to be able to look behind the certification relative to the fact that the Senator from North Carolina mentioned, but the reason that I was willing to accept this is we are talking about two separate procedures: one, the step described by the Senator from North Carolina; two, the step referred to by the Senator from Indiana a while ago, that it is not true that the Attorney General alone can make a determination about whether or not we are talking about an agent, but that is another way in which the judge can look behind the certification.

Senator MORGAN. But if he can't look at underlying documents, isn't it pretty much dependent upon what the Attorney General certifies to him?

Senator BAYH. The judge can and must, as I read this, and certainly as I intend it, look at anything he needs to look at, and indeed, unless the Justice Department can give him enough documentation to prove probable cause that we are talking about an agent, it doesn't make any difference what the Attorney General certifies as far as the information, and the inability to get it in any other way.

Senator MORGAN. It is true that if the judge cannot substitute his judgment for that of the executive branch, then isn't it substantially the same, if he can't substitute his judgment as to whether or not it is a foreign agent?

Senator BAYH. Well, he can.

Senator MORGAN. Well, what does this mean here?

Senator BAYH. Well, if you look at (c) on 9, and (b), particularly (c), where it says "The judge may require the applicant to furnish such other information or evidence as may be necessary to make the determinations required by section 2525 of this chapter."

I mean—

Senator MORGAN. Is that language that we have added, or is that in the old bill?

Senator BAYH. That was a change made by the Judiciary Committee.

Senator MORGAN. By which committee?

Senator BAYH. By the Judiciary Committee.

Senator MORGAN. Well, this is the Judiciary Committee report.

I think the difference between the two of us raises the question that bothers me, and to be perfectly candid, Mr. Chairman, how in the world can we entrust this responsibility to the Federal Bureau of Investigation when the Director Sunday, on a nationwide television program, makes a statement that he had been misled by his own people as regards to what is going on, and he can't determine who misled him, and when he goes out to Westminster, Mo., and acknowledges what everybody who has taken the time to read the public records of the Church Committee knew to be a fact, that unlawful activities have been engaged in by the FBI for a period of time, and then turns right around and writes a letter to the Federal Society of Former FBI Agents and said, "I did it to placate the Senate," and in effect said, "I really didn't mean it; maybe I am paranoid, but until we have seen these things corrected, I am just reluctant to turn over to the Bureau the authority to surveil Americans where there is not reason to believe that they have actually committed a crime." It may be that we are so close in this amendment, which I think is a good amendment, that that amendment could be worded a little differently so that we could get it to be a crime, but it just bothers me. And for that reason, Mr. Chairman, I am going to vote against this today. I am not going to argue and I'm not going to try to persuade anyone else, but I am going, during the recess, to try to study it.

Senator CASE. Would the Senator yield for a question so I fully understand this point?

Senator MORGAN. Yes.

Senator CASE. I am correct, am I not, that in all cases the judge has to make the determination whether a person should be spied on or his wire should be tapped or not, isn't that correct?

Senator MORGAN. That's my understanding.

Senator CASE. And in spite of that, you are still concerned that the evidence should exist that there is a criminal violation involved, or a probability of it, in addition to the other matters that are here indicated as making a person subject to surveillance.

Senator MORGAN. Yes, I am.

Senator CASE. How does that help? I don't think I quite get that because it seems to me that a person who is engaged in one of these three or four other things, (a), (b), (c), and (d), may very well be guilty of a much more heinous activity than a criminal violation.

Senator MORGAN. Well, if it is true, then, Senator, let's make it a crime and let's live up to the fundamental precepts.

Senator CASE. How do you know ahead of time?

Senator MORGAN. You don't always know that if you are pursuing a man who you think may have committed a robbery, you don't always know that it was a robbery, but you have a right to pursue him if there is reason to believe that a crime was committed. But if what you say is true, then let's make it a crime so that we would live within the precept of what I believe to be the constitutional right of every American to be let alone unless there is some reason to believe that he has committed a crime. The thing that disturbs me is the report, the language in the Judiciary Committee report, which of

course says that the court cannot substitute its judgment for the executive branch, which I assumed to mean that he cannot substitute the judgment as to whether or not it is a foreign agent.

Senator BAYH. May I?

The CHAIRMAN. Senator Bayh.

Senator BAYH. The amendment that I originally proposed or was prepared to propose to the subcommittee, and we had drawn up, would have given the judge the—not only the authority, but the responsibility to look behind the certification and determine whether in fact we were talking about what he thought a reasonable man could conclude was the kind of information that we want to observe, in addition to permitting him to look behind the question of probable cause that the person is an agent.

As we first inherited this bill, as I recall, the judge couldn't look behind either one of them, and when the Attorney General said, "this is it, gentlemen," and I want to make it very clear that as far as determination of whether this person was an agent or not, that that is a matter that could be looked behind and could be and was going to be determined not by the Attorney General but by the judge.

Now, I would rest easier if the certification of the kind of information were a matter of determination by the courts. I frankly feel that because we have gone as far as we have here, if we look at (6), at what we are talking about here now, we are talking about in most instances a foreign agent who is committing a crime, the saboteur, the terrorist, the person who knowingly engaged in clandestine intelligence activity for and on behalf of a foreign country which activities involve or will involve a violation of criminal statutes of the United States, conspires, aids, and abets. The only place where we are in this foreign agent area going below the criminal standard is in essence a place where we cannot get the information, where we don't know what kind of information it is, and there we give the judge the determination, leading a reasonable man to believe that the information or material will be used to harm the security of the United States. That is a judicial determination, Senator. That is not the Attorney General's determination, and I think we're on point (a) but not on point (b).

Senator MORGAN. Well, assuming you are right, and I am not willing to make that assumption at the present time, is it not so close to a crime that wouldn't it be better to go ahead and make it a crime so that we would be keeping within the principles and concepts of our constitutional form of government?

Senator BAYH. Well, I would rest easier with it that way, frankly.

Senator MORGAN. Well, maybe during the recess I can figure a way to do it, where we were working the other day in the afternoon in the Appropriations Committee, and we had to go in and out about a dozen times.

Senator BAYH. Well, I think the answer again—and you might come to a different conclusion—we are all painfully aware of the kinds of illegal acts that were participated in, the area of what is legal and what is not legal relative to the authority of the President to act is a grey area. The Senator in his mind knows where the line is. I have got to say that I am not sure I do, and quite contrary to the Senator's argument—and I know he had a good lawyer to argue the case—I get to the fact that in the disclaimer we enunciate that this power can

only be determined by the courts, and does guarantee neutrality. But if we are going to follow the preference of the Senator—and I am prepared, as the Senator from Indiana—I would be prepared to say that we are going to write in the criminal statute really the definition of a crime that we have on (6)(e), a person who knowingly acts pursuant to the direction of an intelligence service. In other words, before you are covered under this bill you have to knowingly act on the direction of an intelligence service that engages in intelligence activities in the United States on behalf of a foreign power, who knowingly transmits information or materials, et cetera, et cetera, intended to conceal the nature of such material, and where a reasonable man would believe that the information or material would be used to harm the security of the United States.

I don't know where we would want to make that criminal standard.

Senator MORGAN. Well, what is the difference in that?

Senator BAYH. The fact that you don't know the information.

Senator MORGAN. But you have reason to believe it would be harmful to the security of the United States.

Senator BAYH. You have reason to believe, the way the man is acting, the fact that he is on the payroll of a foreign power or part of a foreign network. That has to be proven, probable cause. But you do not know what kind of information he is transmitting. That is the missing link.

Senator MORGAN. But you have got to prove that he has reason to believe.

Senator BAYH. The judge has reason to believe.

Senator MORGAN. Which would lead a reasonable man to believe that the information or material would be used to harm the security. When you say "lead a reasonable man to believe," then you have got to assume that that would have led this man to be harmful to the security of the United States.

Senator BAYH. That is not necessarily so because that man may not be a reasonable man.

Senator MORGAN. Well, if he is not a reasonable man——

Senator BAYH. Well, I think it is the reasonable man, you know, that is the test that the judge——

Senator HUDDLESTON. Mr. Chairman?

I would just like to commend the distinguished chairman of the subcommittee, the Senator from Indiana, for the work that has been done on this legislation. I have many of the same concerns that have been expressed by the Senator from North Carolina. Particularly, I supported the Church Committee's position relating to the current powers of the President and also the question of the clear violation of the law being present before wiretaps are authorized, but I view this legislation certainly not as a cure-all to all of the abuses that have occurred, and not the ultimate that we are seeking. I think it ought to be viewed as an intermediate step between where we have been and where we are today and where we ultimately want to be in this matter of protecting the civil rights of citizens of this country.

I don't think we can reach that ultimate objective until we put together the charters of the various agencies that are involved, and then view this legislation in the total concept of what we have accomplished at that time. I think also there are other statutes relating to

espionage and sabotage, and other laws that need to be looked at and determined whether or not some change should be made there.

But I think this certainly is infinitely better than where we are today.

I think in view of the fact that we have not yet conducted our studies as to charters, it would be very difficult to expect that we could reach the ultimate with this legislation. I think it is an intermediate step that we ought to apply, and we ought to be providing the protection it does afford, which I say is greatly better than what we have at the present time.

For that reason, I am going to support this legislation. I am keenly aware that in my own responsibility as chairman of the subcommittee relating to charters, it is going to require that we very diligently pursue that matter, and I can assure the Committee that we are going to do that. We are beginning immediately, and I believe when we get the whole package put together, then we will have or we will begin to know whether or not and to what extent this legislation needs to be altered in order to be sure that we can eliminate those abuses that occurred in the past, and we can assure every citizen of this country that he is not going to be abused by agencies of the Federal Government in the guise of national security.

Thank you, Mr. Chairman.

Senator BAYH. Well, I certainly concur with what the Senator from Kentucky says relative to the importance of the charters, and this gets right down to a decision that each of us has to make and that I have made affirmatively, yes or no, imperfect as it is, and frankly, I am willing to admit that it is imperfect, is it better to have this bill pass now, putting some check, some guidelines on the use of this power in the interim, prior to final disposition, or should we go ahead making no effort to control the abuses which have been brought to our attention.

I am in the affirmative, as I mentioned, and I must say that one of the intelligence-gathering agencies in particular is very unhappy with the bill in its present form. To use the Senator from North Carolina's logic, that ought to make him rest a little bit easier, not totally, but a little bit.

Senator MORGAN. With that particular agency at the present time, I don't think it would help or hurt, Mr. Chairman.

Senator BAYH. Well, is there further discussion?

I don't think the motion has been made.

Senator STEVENSON. Mr. Chairman, I just have one question. First, it isn't possible in a turbulent world to balance perfectly all of the necessities of national security with individual security.

Senator CASE. Would you pull the microphone closer?

Senator STEVENSON. I was just saying, Senator Case, I don't think it is possible to balance perfectly, certainly not to the satisfaction of everybody; the necessities of national security in this fast moving, dangerous world, with those of individuals. This Committee has done an imperfect job. It has, in my judgment, gone a long way toward achieving an objective by interposing judiciary in one state or another against abuse.

I have one question, and that is; is an additional safeguard against abuse the interposition of the Congress. In other words, there would

be the notification after the judicial approval to this Committee and to other appropriate committees of the Congress of all surveillance. Is that the case?

I have just read this bill and I don't find that in it. I thought that that was another safeguard. The question is, to what extent and in what situations does this Committee and other agencies of the Congress receive notification, before or after the fact of surveillance?

Senator BAYH. Well, the only apparent one is the 72-hour provision that we discussed a while ago relative to surveillance that is the result of unanticipated facts. From a very real standpoint, the amendment of the Senator from Colorado and the Senator from Tennessee, that was offered, as I read it, would cause a continuing reference of not only statistics but factual circumstances surrounding surveillances to be made available to this Committee.

Senator STEVENSON. That amendment says nothing in this chapter shall be deemed to limit the authority of the Select Committee on Intelligence of the U.S. Senate to obtain such information as it may need to carry out its duties pursuant to Senate Resolution 400.

It puts no burden on the executive branch to report, and I guess my question is: why? Isn't this another means by which we can't respond to some of the concerns expressed by Senator Morgan in the affirmative duty of reporting to Congress?

Senator BAYH. Well, as I mentioned earlier, I had an amendment drafted which went directly to the point of, I think a very good point raised by the Senator from Illinois, which would require specific reports, not generalized statistical reports, and rather serious discussion of this matter with the Attorney General, and for reasons that I don't feel appropriate to discuss here, he was very alarmed about putting that in the bill as it has been drafted by my staff. He emphasized the fact that in his judgment, as in ours, we had every right to request this information under Senate Resolution 400.

Now, I understand that this Committee is going to avail itself of that right, so that we test the good faith of the Justice Department. In fact, I think it is fair to say we have already done that and found their good faith well founded. It is a technicality, I can say, well, Mr. Attorney General we have the power. Why don't we put it out on the top of the table. Realistically, I think that is what we do here is we and the Congress feel that we have the power to make these requests, and we get these reports; certainly, in the Hathaway language now as part of the bill, the fact that there is an ongoing study and reports to be made annually, will give a very strong interest.

I don't know how you can make this kind of a study and make this kind of a report unless you have available information that concerns the Senator from Illinois, because the nuances, in other words, the sophisticated nuances that frankly escape me, with deference to the Attorney General when we decided to take out that specific requirement, to do nothing, and subsequent to that, the Justice Department was willing to go along with the language presented by Senator Hart and Senator Baker.

Senator STEVENSON. Well, this is an old story. Congress has always had the power to request information, but it has not in many contexts exercised that power to request information of which it isn't aware, and so we have another context move to place an affirmative burden



on the executive branch to give us the information, and I don't know why that general proposition isn't a sound one here.

What are the objections of the Attorney General to keeping appropriate agencies of the Congress notified of orders entered for the surveillance of American citizens? We are placing that burden on the executive branch. That is a serious question and in another context, far more delicate than this one.

Senator BAYH. Well, I think the burden is placed on this Committee by Senate Resolution 400. It is clearly placed on the subcommittee chairman by being appointed to the subcommittee, the chairman of the subcommittee to protect the rights of American citizens, and I intend to ask for that information continuously in a time forthcoming, and to take the steps necessary to make sure that there is no way around it.

Now, in deference to the Attorney General, as long as he says we have the power and make the requests—requests have been granted—I and prepared to go forth on the basis of the authority we have under Senate Resolution 400, and very frankly, unless this Committee is willing to take the initiative, which very frankly was not handled well by the previous oversight committees, unless we are willing to take the initiative, it doesn't make any difference how much information they send up here. We have got to dig into it. Frankly, we ought to take the initiative, we will take the initiative.

Senator STEVENSON. Mr. Chairman, I will also vote to report this bill, but with reservation. We will have another opportunity to consider amendments, and with the hope that one amendment might be such a proposition as I have outlined, an affirmative duty on the part of the executive branch to keep this Committee apprised of its surveillance activities as another safeguard against abuse of individuals as I think, an effective deterrent to actions by the executive branch which would meet the approval of the judiciary, which could unnecessarily infringe on the rights of American citizens.

Senator BAYH. Well, I appreciate questions from the Senator from Illinois. I find myself following his logic and agreeing with his logic as one Senator. I had a bill and amendments specifically designed to require this and it was only being made chairman of the subcommittee desiring to reconcile this and trying to get the bill to move that I came to the conclusion that we could handle it as I have described, not that it needed to be handled, but that we could handle it, maintain the support of the Attorney General, and not put it specifically in the bill.

Now, I say that apparently in the last 24 hours the Justice Department has lessened its opposition to handling this because they have at least been willing to come up with the language which was offered by the Senator from Tennessee and the Senator from Colorado. Twenty-four hours ago they wouldn't even want to do that.

Now, maybe between now and when this matter hits the floor we can persuade them of the wisdom of the Senator from Illinois, and it might clear this up for the Senator from Indiana, because I might say, we are playing games with ourselves, when the Attorney General says we have the power and we say we have the power, but we don't put it on the face, and for reasons that I would be glad to discuss with the Senator from Illinois that I would rather not discuss here, I am sure you would agree with that. I think we are kidding

ourselves and I think he is kidding himself. Maybe he has come to the conclusion that he is kidding himself because he is willing to go along with us on this.

Senator STEVENSON. Well, Mr. Chairman, I think you have done an admirable job preparing and bringing this legislation to us, but this is one subject that I think deserves more study by the Committee, and after all, it is Congress, not the Attorney General who writes the laws of the United States.

Senator BAYH. There is no question about that, and there are provisions in here that the Attorney General almost had to be dragged, kicking, and screaming to concur in, and his concurrence is only relevant if we feel that it is important to have these improvements to get it passed. You know what we say about the peacemaker getting it in little pieces. Well, that is where I am right now.

Once, on one side I am certain that the agency involved and their constituency in the country is not going to be satisfied on this bill, it is too tough; on the other hand, some of our friends, that may have been watchdogs and sentinels as far as civil liberties are concerned, they aren't happy with us. They don't feel we have gone far enough.

So it has not been a very amiable position to be in, but I am glad to be in it.

All right, is there further discussion?

The CHAIRMAN. Mr. Chairman, I am sorry, I had to step out to the Appropriations Committee to give them a quorum. Like most of us here I will be supporting this measure with some reservations.

However, I am personally convinced that if this measure should be enacted into law together with the provisions of Senate Resolution 400, especially considering the amendment that was adopted by this Committee, the amendment of Senator Baker and Senator Hart will place upon this Committee responsibilities that were heretofore nonexistent.

I have been just told that Senator Stevenson does not quite agree with this. This is the first time by statute where the provisions of Senate Resolution 400 will be recognized as part of the laws of this land, and under the provisions of Senate Resolution 400 and under the provisions of this bill, the Attorney General of the United States will be required to report to us every surveillance, every wiretap that it carries out with all of the pertinent information thereto, and under the procedures of Senate Resolution 400, which you are now following as it relates to covert actions, this Committee can first, if it disagrees with the wiretap, communicate with the Attorney General and advise him of our concern and disagreement and ask him to stop. If he refuses, we can go to the President of the United States. If the President of the United States should refuse, we have the authority to call upon the Senate of the United States, if necessary, in executive session to set forth the facts as we see it and recommend that it concur with our thoughts, and if the Senate should concur with our views, we can be authorized to call upon the President once more, and if he refuses, we can take appropriate steps, and as far as I am concerned, appropriate steps could mean stopping appropriations or disclosing the facts of the wiretap.

And so, I am convinced that if the Attorney General should fail to carry out the intent of this law, and if the judicial system should somehow falter and fail, there is still another body; for the first time

in our history, the Congress of the United States can get into action and insist upon the carrying out of the intent of this law.

So, keeping that in mind, I will be voting for this measure.

Senator MORGAN. Mr. Chairman, can I make one request to the staff? I wish the staff would briefly, question on section (E) with defining foreign agent, a briefing question as to whether or not such a person would actually violate the law if he did all of those things, and rather than assigning one staff member, I wish you would assign two staff members, one to take the pro and one to take the con. It comes very close, and if it does satisfy my objection, if it doesn't, maybe it will come close enough.

Senator BAYH. It does come close, and I think maybe it is one particular area which might make sense, the weak point, and bringing in probable cause criminal cases, this is where circumstances of transferred information, of a clandestine character of the operation. If we know the guy has passed on missile plans, that is—

Senator MORGAN. Well, let's have somebody brief both sides. I haven't had time to study it. It may very well be that it does.

The CHAIRMAN. The chairman directs the staff to prepare that. Any further questions?

Senator BAYH. Well, Mr. Chairman, before we close up our official record, I would like to personally thank the staff for the tremendous work they have put into this. They have worked diligently. They have been hard negotiators. They have been frustrated in reaching agreement after agreement, and every time something would come up they would have to go back and try again. I want the record to show that we are thankful for their efforts.

The CHAIRMAN. Well, before we end, after the vote, the Committee will have a short meeting on certain nominations in executive session.

Gentlemen, this is a historic vote. This is the first bill that this Committee will be reporting out. I am certain that you have considered this very carefully. I would like to join my colleagues in commending Senator Bayh and the members of the subcommittee for the diligence with which it handled this matter. As noted by Senator Morgan, it is not possible to come forth with a perfect bill. I have yet to see a perfect bill passed by the Congress of the United States, but I think this comes as close as one can hope to, considering the circumstances, of being a perfect bill.

You have heard the question.

Senator CASE. Mr. Chairman.

The Chairman. Yes.

Senator CASE. I just want to say that I agree with everything that everybody has said with respect to the difficulties and the necessity for compromise in order to get a bill that the executive branch would not veto. These are all factors involved in this and I still don't want to denigrate the product because I think it is an amazingly good job for which the Senator from Indiana and the staff deserve enormous credit, and I would like to include Jake Garn in that because he has shown a great deal of capacity for adjustment of views which is not always found in a younger member of this body.

Senator BAYH. Yes, I thank the Senator from New Jersey I thank him for his accolades, but I have heard the reservations from many of the staff about not going far enough here. I think, in Senator Garn's

absence, it should be emphasized that he was one of the ones who said we did go much too far, and yet he was very helpful in moving this.

The CHAIRMAN. You have heard the motion, that Senate Resolution 3197, as amended, be reported to the Senate, with the understanding that this measure will be open for further consideration, and that those wishing to make amendments do so before noon the first business day after the recess. This measure will be reported to the Senate prior to the closing of the first day after the recess.

If there is no discussion, all those in favor say aye.

[A chorus of ayes.]

The CHAIRMAN. Opposed?

Senator MORGAN. No.

The CHAIRMAN. We have a quorum here.

Senator CASE. A rollcall will be fine, or if not, I would like to indicate some of my colleagues.

The CHAIRMAN. Fine, we will call the roll.

Mr. MILLER. Mr. Bayh.

Senator BAYH. Aye.

Mr. MILLER. Mr. Stevenson.

Senator STEVENSON. Aye.

Mr. MILLER. Mr. Hathaway.

[No response.]

Mr. MILLER. Mr. Huddleston.

Senator HUDDLESTON. Aye.

Mr. MILLER. Mr. Biden.

[No response.]

Mr. MILLER. Mr. Morgan.

Senator MORGAN. No.

Mr. MILLER. Mr. Hart.

[No response.]

Mr. MILLER. Mr. Case.

Senator CASE. Aye.

Mr. MILLER. Mr. Thurmond?

Senator CASE. Mr. Chairman, Senator Thurmond expressed some views about this. I think he would have preferred the Judiciary Committee bill, but I believe he would go along here, and that makes me suggest that since he has been here, that he be given a chance to.

Senator BAYH. Well, would it be appropriate, Mr. Chairman, to get the staff to poll the absent members if we have a majority of a quorum that passes out the bill?

The CHAIRMAN. Fine. See how it works out.

Mr. MILLER. Mr. Hatfield.

[No response.]

Mr. MILLER. Mr. Goldwater.

[No response.]

Mr. MILLER. Mr. Stafford.

Senator CASE. I have his proxy. Aye.

Mr. MILLER. Mr. Garn.

Senator CASE. The same.

Mr. MILLER. Mr. Baker.

Senator CASE. Aye.

Mr. MILLER. Mr. Inouye.

The CHAIRMAN. Aye.

The majority of those present and by proxy have voted in favor, eight, to one against.

Without objection, the absentees will be polled by the staff.

If there is no further business, this Committee will go into executive session to consider other matters.

Thank you very much.

[Whereupon, at 12:54 p.m., the Committee proceeded to the consideration of other matters in executive session.]

TUESDAY, AUGUST 24, 1976

U.S. SENATE,  
SELECT COMMITTEE ON INTELLIGENCE,  
*Washington, D.C.*

The Committee met, pursuant to notice, at 10:29 a.m., in room S-407, the Capitol, Hon. Daniel K. Inouye (chairman) presiding.

Present: Senators Inouye, Bayh, Stevenson, Hathaway, Biden, Morgan, Hart of Colorado, Case, and Hatfield.

Also Present: William G. Miller, Staff Director, and Michael Madigan, Minority Counsel.

The CHAIRMAN. I very much regret this delay, but we have been waiting for Senator Case.

This meeting was called at his request. Senator Case has an amendment he would like to present to Senate bill 3197. At this time the Chair recognizes Senator Bayh, the chairman of the subcommittee.

Senator BAYH. Mr. Chairman, I am familiar with Senator Case's amendment. I think perhaps we should wait to see if he arrives. I am prepared to accept it. I think what he does is provide perhaps a bit more definitive description of what we mean by minimization as preferred by the language of the bill and by the normal interpretation of that particular trade word.

The CHAIRMAN. The Chair has been advised that Senator Case is on his way, so why don't we take up your technical amendments.

Senator BAYH. Fine; I have a sheet of technical amendments relative to making certain that all the sections and subsections of the bill conform to the action we've taken. The staff tells me that some of the wording was not properly punctuated, and some phrases were not consistent with other phrases, and that the Committee would like to have a look at this.

In Title II—Mr. Connaughton is passing that sheet of paper before you—it is conformational language and technical in nature.

The CHAIRMAN. Has this been studied by majority and minority staff members?

Senator BAYH. It is my understanding they are prepared.

Mr. MADIGAN. Yes.

The CHAIRMAN. Are you satisfied?

Mr. MADIGAN. Yes, we both are in agreement.

The CHAIRMAN. These are technical in nature and not substantive.

Mr. MADIGAN. That's right.

The CHAIRMAN. Is there any objection to adopting these amendments?

Senator MORGAN. Mr. Chairman, let me ask, when was this prepared?

The CHAIRMAN. Senator Bayh?

Senator BAYH. It was finalized yesterday.

Senator MORGAN. Mr. Chairman, I don't raise any objection

because I take the staff's word for it; however, it is two pages long, and I would have preferred to have had it long enough to at least gone over it earlier. I accept the staff's word for it, but it does raise the question of timing.

The CHAIRMAN. As the Committee is aware, this measure has already been passed, and the Committee has voted to report this to the full Senate, with the understanding that this measure will be open for amendments until 5 p.m.

Now, if it is your wish, this amendment can be studied in the interim and then brought up on the floor.

Senator MORGAN. I don't really want to do that. We say this has been cleared by the minority and majority counsel, and it no doubt has, but I asked my man if he has checked it over, and he hasn't because it has not been available. I just raise this for a question for the future. I just think they are too important. Of course, we have been out of session, so I don't raise any question on this as I understand it.

Senator BAYH. Well, if I might say, in defense of Senator Morgan's position, I am one of the last ones to try to bring something like this to our attention in an abbreviated form because I know how confusing and controversial the whole bill is; and this word of defense to the staff: These technical changes that have to be made, it was our intention of presenting them on the floor; as a floor amendment and everybody would have had a chance to study them at that time. We did not know for certain whether it would be necessary to have a Committee meeting, but since the Senator from New Jersey did request a Committee meeting, as he has every right to to, I would prefer that the Committee at least have a chance to look at the technical changes.

If you would rather wait and put them off until a floor amendment, I have a couple of other relatively insignificant amendments which are a bit substantive in nature, but I thought that since we did have the meeting the Committee might want to look at what they are, and if you want to wait until we get to the floor to take action, I think that is all right.

Senator MORGAN. I don't raise that much objection. It is just the timeliness of this sort of thing that I was emphasizing.

The CHAIRMAN. I assure you that the Chair has noted your comment on this matter. I think it is only proper that amendments of this type should be submitted in a timely fashion so that all of us will have some opportunity to at least glance over them before we make a decision.

Is there any objection? The Chair hearing none, the amendments submitted by the chairman of the subcommittee are adopted.

We are now ready to discuss your amendment, Senator.

Senator CASE. Thank you, Mr. Chairman. I'm sorry I wasn't here at the beginning, but I had to represent the minority at the Foreign Relations Committee meeting which is regularly scheduled for this time, and I appreciate your making it possible for me to do this, too.

I have an amendment which has been distributed, at section 2521. It is on page 8 of the new print. I think it follows on page 8 of the new print, too, the bottom of the page. I take it that it is a new,

additional definition of the term "minimization procedures." It reads, quite simply:

Procedures to minimize the acquisition of information that is not foreign intelligence information, to assure that information that is not foreign intelligence information not be maintained, and to assure that information obtained not be used except as provided in Section 2526.

The purpose is to provide general guidelines for taps so that no more information than necessary is collected in an effort to get foreign intelligence material. Of course, the change is to protect privacy as far as we can. For example, not accumulating tape recordings on the personal life of a targeted family, that if a person is customarily in his office in the daytime, you don't tap his home at that time and that type of thing, and it has been gone over by the staff. I understand it is satisfactory technically, and unless there is some objection or anyone has any further objections, I would move that it be approved.

Senator BAYH. Mr. Chairman, I have no objections to the amendment on minimization.

The CHAIRMAN. You have heard the amendment. Is there any discussion?

Without objection, the amendment is approved.

Senator CASE. Thank you, Mr. Chairman.

Senator BAYH. Mr. Chairman, if I might bring to the Committee's attention, here again we have copies of this. I understand there was a staff meeting yesterday, but all of the staff members were not present, so it is possible that all the Senators have not been briefed.

I just want to pose these amendments now. I can either pursue them to a vote now or do so on the floor. They are partially substantive but relatively inconsequential I might say to you, and I might just ask your perusal. If you all have that two-page amendment, one of the parts to section 2526, on page 25 of the bill, which as you recall in the subcommittee markup where we were dealing with how you would handle information that was given in a tap that was subsequently used in a criminal prosecution. I believe that this matter has really been of the greatest concern to me in this whole bill.

We had arrived at language, that in essence would require the disclosure of the judge, thought that there was a question of legality. In the give and take that resulted in the subcommittee markup, we created a proviso that on closer examination has created a great deal of concern and confusion in a lot of people's minds. I am offering an amendment that would strike that proviso and insert, after "surveillance" there on line 3, page 25, the language of the amendment that would say that the legality of a surveillance, that such disclosure would permit a more accurate determination of such legality. I think most of you are familiar with what I am talking about. I am talking about the information that is gathered accidentally as the result of a tap. The judge is faced or the prosecution is faced with using the evidence or letting the case slide.

Senator CASE. The part that was struck out is the same as that which you would insert except for the words at the end, and the national security—

Senator BAYH. It would go back really to the way it was, basically, before we created the proviso which I think sounded good to all of us.



but at the time we didn't realize some of the ramifications that would be forthcoming. So I think we ought to just go back to where we were. It is just a reasonable question as to the legality of that tap, and the disclosure of the information would help determine the legality, the judge has a right or has an obligation, rather, to disclose it, even if it is a national security question, and at that point the prosecution has to determine whether they want to proceed, or whether in proceeding they are going to damage sources they don't want to damage.

That is not inconsistent with the decision they have to make from time to time in criminal cases of a non-national security character.

Now, the second amendment on the following page, 2526(b) is nothing more or less than making this conform to the Title III provision. We had another section which we had this conforming language in. The language that is stricken in the bottom of the first paragraph, starting with "the judge" and we thought that that took care of the whole bill. But here again, on studying, and discussing this with the Justice Department as well as other attorneys, we found that this did not cover all aspects, and we had wanted to cover all of the aspects

So we are putting that back and striking "and the national security," which would make it conform with the language that is contained elsewhere in the bill.

I don't know whether you want to accept these now, vote them down, or wait until we get to the floor. I just wanted to alert you that we want to present them. I think they are relatively nonconsequential.

The CHAIRMAN. Is there any discussion?

Senator BIDEN. Mr. Chairman, I think they strengthen the bill, and I would like to see us adopt them now. I think it is a positive addition.

Senator CASE. I agree.

The CHAIRMAN. I gather from the nodding of heads here that all, if not most of you agree with this amendment.

Is there any further discussion?

Any objection to the adoption?

There being none, the amendment is adopted.

Senator BAYH. I might just say in addition, thank you. This is a further recognition of the fact that this whole matter has been a delicate balance of what we think we can get, with some people who still don't want us to have anything, and some people saying we have gone too far and some people saying we haven't gone far enough.

Thank you, sir.

Senator BIDEN. Mr. Chairman, if I might comment briefly, I would like to follow up on a point made by the chairman of the subcommittee in the subcommittee. As a member of the subcommittee, working with the help of a former member of the staff, Mark Gitenstein, who was a great aid to me in this, I tried very hard, along with the chairman and the ranking member of the minority, to work out a compromise. I felt, in good faith, in light of the fact that I spoke so long if not loud about certain aspects of this bill with the Justice Department, that the portion I was most concerned with and most of the compromise offered by me and others was adopted, I felt obliged, in good faith, to support the bill in subcommittee and to report it to the full Committee and report it out. I just want to go on record now as saying that I probably will support it on the floor. But I reserve the

right on the floor, as we automatically do, to state to the Committee, to not support the entire bill. I will offer no amendments to alter it, but I want to level with the Committee, I am not sure what I am going to do.

I missed the last meeting because of illness, but had I been there, I would have voted for this bill being reported out.

I am sorry that the Committee did not restrict or eliminate the inherent authority legislation. I hope that this Committee doesn't feel prejudiced in any way by the development of this legislation in drafting statutory charters for the intelligence community. I think it has been stated by all or most of us that we do not feel that way, but I just want it on the record now that passage of this bill should in no way affect the permanent charter writing of this Committee and the subcommittee involved. I hope we keep that in mind.

I have one last comment which is really a question. I would like to file differing views on this, if I may, and I would like to inquire how much time I have to do that.

The CHAIRMAN. Three days.

Senator BIDEN. Three days. OK, thank you very much.

The CHAIRMAN. Any further discussion?

Senator STEVENSON?

Senator STEVENSON. Mr. Chairman, I have an amendment, also. At the last meeting of this Committee I expressed some doubts about the ability of this Committee to conduct its oversight responsibilities with respect to electronic surveillance conducted under this legislation without assurances that it would be informed of such electronic surveillance. This amendment would require the Attorney General, upon the request of the Select Committee, to provide it with information relating to electronic surveillance conducted pursuant to this legislation, such information as the Committee requires from time to time in order to keep itself currently and continuously informed of the electronic surveillance activities of the Attorney General, including those conducted for the purposes of conducting testing of equipment.

I understand, however, that negotiations are underway between the Committee and the Justice Department which I am led to believe will, outside the legislation, provide the Committee with adequate assurances that it will be kept informed about electronic surveillance.

So, if that is the case—and maybe Mr. Miller or Senator Bayh could give us assurances that it is—if it is the case these negotiations are underway and will produce such assurances, I will not press this amendment now. I will wait until the floor, and then if we do have adequate assurances from the Justice Department that we will be kept informed about all such electronic surveillance, I won't offer the amendment.

If, on the other hand, those assurances don't materialize in a satisfactory form, I would reserve the right to offer this amendment when the bill comes up for action on the floor.

The CHAIRMAN. I would like to advise the Committee that discussions and negotiations are presently underway at the staff level with our staff and that of the Justice Department on the matter that you have just discussed. As a demonstration of good faith on the part of the Justice Department, the Department has advised the subcommittee of the present status of electronic surveillance, the number of

persons under surveillance at this time, and where and what for. In this report, the names of those under surveillance were not provided, however, we have been assured that if the committee believes that these names are necessary, without hesitation they will be provided us. I thought at that time, that on a need-to-know basis, the names were not necessary.

Senator STEVENSON. Well, I am not suggesting, nor is this amendment requiring that the Committee be informed about all of the names. That may be information that the Committee would from time to time want in the future, Mr. Chairman, and what is more, I agree, from all I have heard, the Justice Department has been most forthcoming.

I do not imply by any means any complaint at the present about the attitude of the Justice Department toward this Committee. I am simply seeking assurances that that attitude of cooperative spirit continues into the future. If that assurance can be nailed down in the form of some agreement between this Committee and the Justice Department before this bill comes up for action on the floor, I won't offer this amendment.

The CHAIRMAN. I would like to assure my colleagues that if these negotiations and discussions should fail, and if we are unable to come up with any satisfactory agreement with the Justice Department, I would join the Senator in this amendment.

Senator STEVENSON. I thank the Chairman.

Senator BAYH. Mr. Chairman, I would also like to say to the Senator of Illinois, that I think this is a very important matter that he raises. When we originally started to mark up the bill, we had language prepared a bit differently than the Senator from Illinois, but the thrust would have been the same; namely, thou shalt report.

I personally would be more comfortable if it was in the bill, and I would like to point out that this is one of those areas which the Justice Department and the Attorney General personally feel is very sensitive. They feel very strongly about it for reasons which were discussed in executive session, that frankly I think would be inappropriate to raise here. Because of their sensitivity to having a hard bill, I think in good faith they are proceeding, and I think we can make a judgment when this matter reaches the floor. If this has not been substantiated with more than talk, to follow the Senator from Illinois' lead, I would be prepared to follow his lead and the chairman's lead on it.

The CHAIRMAN. Any further discussion?

Senator CASE. Mr. Chairman, in that connection, have we had any discussion when the leadership plans to bring the bill up?

The CHAIRMAN. None whatsoever. The only thing that is definite at this point is that this Committee has, by a motion, moved to report this measure out this afternoon. I will do my best to have this measure be given the highest priority. I would assume that since this bill has been amended in a rather significant and substantial manner, that Senator Kennedy will insist upon a lot of time for debate. This will not be a noncontroversial matter, I can assure you.

Senator CASE. And this Committee will participate in the floor handling of it, I take it.

The CHAIRMAN. Oh, yes. The parliamentary arrangement hasn't been worked out, but I am certain this Committee will be playing a very active role. This Committee has amended the bill as reported out by the Judiciary Committee.

If there is no further discussion, this measure, pursuant to prior direction, will be reported to the Senate prior to 5 o'clock this afternoon.

I have been requested by Senator Hart that we meet in executive session so that he can present to us his report on his findings on the Rosselli matters. As you know, Senator Hart went to Florida to look into the Rosselli matter, and so upon adjournment, may we retire to the secure room.

If there is no further business, we will adjourn.

[Whereupon, at 10:55 a.m., the Committee proceeded to executive session.]

